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SUPPLEMENT — IMPORTANT TEXTS OF AN INTERNATIONAL CHARACTER.

THE AMERICAN JOURNAL OF INTERNATIONAL LAW is supplied to all members of the American Society of International Law without extra charge, as the membership fee of five dollars per annum includes the right to all issues of the JOURNAL published during the year for which the dues are paid.

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INTERNATIONAL ADMINISTRATIVE LAW AND NATIONAL SOVEREIGNTY

The conception of a law common to the entire civilized world has received a new content and a practical interpretation through the recent development of international unions. The numerous private unions and associations for international purposes constitute a spontaneous grouping of men throughout the world who are interested in certain lines of enterprise — industrial, political, or scientific — which are not limited by national boundaries, but have the whole world for their field of action. The number of such associations already created is indeed surprising. Nearly every type of social effort for the promotion of the broader interests of mankind has been organized in this manner, so that there are literally hundreds [1] of international unions and associations. These bodies hold periodical conferences for the interchange of opinions and the comparison of results, and in many cases they have established permanent bureaus or offices.

The *public unions* which have been formed by the action of states, and which are now operating as public agencies of international interests, indicate the extent to which the national authorities have come to realize the importance of interests and activities that transcend in their operations the boundaries of the national state. There are over thirty of such unions, most of them endowed with permanent organs of administration, which enable them to fulfill, even though only in a rudimentary way, the three classic functions of government — the legislative, executive, and judicial. The interests which they represent and administer can be understood only when we consider the human world as a totality of interrelated forces and activities. From this point of view any other organization that might be given them would be defective in point of extent and efficiency.

1 The number of international congresses held in the year 1906 was at least one hundred and sixty. See lists in the Annuaire de la vie internationale, 1906.

When any social or economic interest has assumed the character of a world-wide relation, when its activities in order to succeed must rest on the experience of all mankind, and must extend their operations over numerous national territories, then such an interest can be effectively regulated only upon a world-wide basis. The legal aspects of its organization and action can be expressed only in the terms of a law enacted from the point of view of international relations, rather than resting upon the experience and policy of any national state. The world law which is thus created is not merely an intellectual product such as the natural law of the older jurisprudence. Quite the contrary, it is the legal expression of positive interests and activities that have already developed in the life of the world, that are expressing themselves in action, and are therefore entitled to have their relations expressed also in juristic form. A law of this kind, while aiming at universality, will strive to avoid purely theoretical construction and will aim to base itself upon ascertained needs and actual experience.

When the principal interests that have already received an international organization are passed in review, it is not difficult to recognize in them those characteristics which make them essentially international. It is an often-repeated saying that the world at the present time stands in the sign of communication. The ideal of the civilized world with respect to economic relations is that the entire surface of the globe should be rendered readily accessible to the enterprise of all the world, and that rapid and uninterrupted communication should make possible a uniform management and control of the natural resources which humanity has inherited. The demands thus made upon international policies have their material support in the great advances recently achieved in the practical sciences and arts of communication. But in order that the greatest advantage may be gained by mankind from these inventions, a liberal character should be imparted to legislation. We need a uniform law of transportation by land and sea in order that the efficiency of communication may not be impaired by unnecessary local differences of regulation. Scientific jurisprudence has directed itself to the task of gradually unifying the principles of maritime law and restoring its character of a

world law, so that it may again be universal as it was in its original medieval form. The European Railway Freight Union has created an international code of transportation which must be considered one of the most notable achievements of modern international activity in the field of legislation. The very nature of communication makes it an international interest and establishes the unavoidable necessity of legislating in this matter from the point of view of universalism — regarding the world as a unified economic organization.

The same principles apply to correspondence by letter and telegrams. Rapidity of intelligence and notification is essential to the success of the efficient exploitation and control of the manifold natural resources of the earth and of its greater industrial and commercial enterprises. The impossibility of treating any of these interests from the point of view of a national policy alone was illustrated in a most striking fashion in the case of radiotelegraphy. When this process had gained recognition as a practical method, the British Marconi Company secured an exclusive contract with the British Lloyd and with the Italian Government for telegraphic service between vessels and the coast. Under this arrangement the wireless stations in these two countries would refuse to receive or send messages of any other system than that of Marconi. The political advantages of such an arrangement to a power like Great Britain are apparent at first sight; but this attempt at establishing a universal monopoly in so important an interest aroused the opposition of other states, especially of Germany, and it was attacked in the name of the general freedom of communication among nations. The two powers which favored restriction could not resist the logic of the opposition, so that finally in 1906 an agreement came into being which guaranteed for the future the international freedom of wireless communication.

Other interests which have been organized on an international basis, while not so clearly international in their nature, nevertheless contain prominent elements which have led to insistent demands for a universal organization. The scientific and positive interests connected with labor have long been organized on an international basis, and the problems of labor legislation can be dealt with satisfactorily

only from an international point of view. There are several elements in the labor situation of the world which render such a policy necessary. In order adequately to protect its own labor elements, any nation would be obliged to enact legislation which might seriously handicap its national industries unless assurance were given that foreign competitors should be bound by the same obligations. Efficient protection of national labor is therefore scarcely possible through the isolated efforts of an individual state. It must rest upon a basis of international understanding. Moreover, labor itself is an international force. Scarcely any nation at the present time provides from its own population all the labor forces of which it is in need. More or less permanent migrations of laborers from country to country take place at all times. The supply of labor therefore is international in scope and calls for international control.

Among all the prime economic interests that of agriculture appears at first sight to be entirely local and national. Yet, a less superficial consideration of the interests involved will show that agriculture is by no means an activity that can be fully protected upon a national basis. International protection is demanded against the importation of plant and animal diseases. In order that agricultural operations may effectively be adjusted to atmospheric and climatic conditions, the meteorological service ought to be organized upon an international basis. Accurately to determine the status of the market for agricultural products, world-wide determinations of the conditions of supply and demand are necessary; and agricultural labor, in fully as great a measure as that employed in the industries, is dominated by international conditions and population movements.

In scientific and administrative processes, it is the common experience of the entire world which is required in order that the most satisfactory results may be obtained. But it is especially in the field of criminal and sanitary administration that a large measure of international cooperation is necessary in order that national property and population may be protected. Modern criminal administration looks upon punishment as the lesser among its various tasks and concentrates its efforts upon the means of preventing crime. Hence, extradition by no means fulfills all the requirements of international

action. Crime is organized internationally; the prevention of crime must therefore be effected in a similar way. We need only think of the most fundamental crime against state existence, the plottings of revolutionary anarchism, to realize fully how important international cooperation will be to the future efficiency of the protective service. Thus, we may review all the interests of civilized humanity, intellectual or material, and we shall doubtless find in each of them certain elements which call for international action and organization. It is only when full advantage is drawn from the possibilities of international cooperation that such interests can in the future unfold and grow to their proper importance.

The body of law which is thus being created by the action of the authoritative organs of public international unions, and by cooperation among governments, is distinguished from general international law in that it not merely regulates the relations between national states, but undertakes to establish positive norms for universal action. We may tentatively apply to it the designation of international administrative law, defining it as that body of laws and regulations created by the action of international conferences or commissions which regulates the relations and activities of national and international agencies with respect to those material and intellectual interests which have received an authoritative universal organization. The law thus created contains principles and rules that might be viewed as the beginning of a universal civil law. This is true especially with respect to rules created in the matter of communication, such as the principle that telegrams and letters *must* be carried, but even these principles refer to administrative action, so that they may be embraced in the designation which we have used above. Should the efforts to unify the maritime law of the world be crowned with success, the body of law thus created would not properly be included under the above designation; it would be important enough by itself to be dealt with under its traditional name as a branch of the universal law of communication. In its elaboration and enforcement, however, international administrative organs would take an essential part.

The general purposes that are being achieved by the creation of an

international administrative law may be looked at from three different points of view. It is desired, in the first place, that a mutuality of advantages be secured for the citizens of all civilized states. In a portion of international legislative administration, the object therefore is not so much to change the national law as to secure for the subjects of one state the advantages of legislative and administrative arrangements in others. The national law with respect to patents, copyrights, or the admission to liberal professions may continue to differ in the various jurisdictions. The object of international arrangements would be to secure for the foreigner the advantage of the national law as it stands, so that he would be placed in the same position of right with respect to these matters as are the subjects of the state in question.

A second general object is the regulation of the administrative activities with respect to these world-wide interests on a basis adequate to their extent and importance. Such regulation may create an entirely new law, which the various national administrations bind themselves to respect, or it may involve the modification to a certain extent of national methods of procedure.

Finally, there is the ideal of uniformity or universality of law, which will be to a certain extent pursued in all these international unions. This ideal, on account of the simplicity and equity of the relations which it involves, is not merely attractive from the intellectual point of view, but, in a measure as it is achieved in any field, it clearly serves to free business intercourse and action from all kinds of difficulties and obstructions. It must, however, be noted in connection with this idea that it will be far easier to introduce uniform principles into the field of pure administrative activities than to establish a similar homogeneity in principles which have become part of the civil law. International administration has the advantage of operating largely in a field that has not been occupied as yet by systematized methods and historic traditions, such as is the case in the field of private law. Private international law, dealing with conditions and characteristics based on a long national experience, has far greater obstacles to overcome in its unifying efforts than has international administrative law.

As the purposes thus outlined are achieved more and more, great advantages are to be gained. Homogeneous development, uniformity, and simplicity are favored. Commercial and industrial intercourse is facilitated by the absence of irrational local differences in legal rules. Unfair competition is prevented by the uniformity of national regulations, which places competition the world over upon a higher plane, and which checks the granting of entirely unfair advantages to national enterprises and industries. The disadvantages flowing from the lack of international cooperation may be illustrated by examples taken from the field of insurance. As the operations of life insurance have become international, the scientific and technical activities connected with insurance have already been given an international organization in the Actuarial Congress. This interest has not, however, as yet been provided with public organs of international administration. The attitude of various national administrations illustrates the difficulties created by a lack of uniformity in regulations. Thus, the German Government demands that any foreign insurance company doing business in Germany shall submit its transactions in all the countries of the world to the control of the German administration. France has recently established the requirement that all insurance companies operating in that country must invest solely in French public securities, which pay at the present time an interest of about three per cent. These regulations are plainly due to the solicitude of the national administration for its subjects who may become insured in foreign companies. But consider what a burden is placed upon the business of insurance — a burden which of course must ultimately be borne by the insured. If each government should demand an account of the entire business of a foreign insurance company for the purpose of complete control, the expense and burden involved would become intolerable. When the governments of the older states require investments to be solely in their own low-interest-paying funds, they exclude the insured from the advantage of perfectly safe investments in new countries at nearly double the rate of interest. All these difficulties would be avoided could there be created an international bureau for the auditing and control of insurance investments. Investigations of the

business of a particular company made once for all with perfect methods on a world-wide basis could safely be accepted by any national administration, and all the advantages open to investors the world over could thus be enjoyed by the insured of any international company.

Whenever we are considering any body of law, it is of interest and importance to inquire how its individual principles are enforced. With respect to international administrative law reliance must in the main be placed upon the enlightened sense of self-interest of the national administrations. In as far as they themselves realize the importance of these arrangements to themselves and to the interests intrusted to their care, will they be ready and willing to enforce the principles of international legislation without any ulterior sanction. In the present condition of the world, it will perhaps for some time be impossible to strengthen the administrative organs of the international unions so as to provide them with powers of execution against national administrations. Some means of stricter enforcement have indeed been provided. In some of the unions the individual governments are required to furnish annual reports upon their legislative and administrative action with respect to the interests in question. It is understood that if these reports show that the requirements of the union have not been fulfilled, the public opinion of the world, diplomatic pressure, and ultimately exclusion from the union will be sufficient to provide a sanction. In this matter we have to rely upon the accuracy of the reports which the various administrations are bound to furnish, but we may rest assured that generally they will be careful to have their official reports correspond to the facts. How important these reports are to international administration is illustrated by the case of such a union as that for the prevention of phylloxera. Each administration is bound to report upon the occurrence of this disease in its wine-producing regions, and upon the methods that have been used for its suppression and for the protection of other parts of the country. Foreign nations should be able to rely absolutely on the accuracy of these reports and upon the good faith of the government in protecting itself as well as others by a strict fulfillment of its international

obligations. When the labor-protection treaty was concluded between France and Italy in 1906 it was provided that each party must annually publish a complete report of its administration in the matter. This arrangement was criticised by French publicists on the ground that Italian inspectors would exercise a certain control over the French administration, and that the convention gives to each Government the right of superintending the labor police exercised by the other. And yet it is inconceivable how the enforcement of treaties of this kind may be secured without such means of international intelligence. Another method was employed by the union for the protection of submarine cables. The conference of 1886 appointed a commission on the enforcement of the treaty, which examined the laws and practice of all the treaty states and reported as to which of them were not giving effect to the convention. In the labor conference of 1890 Germany proposed that the execution of the treaty measures should be secured by a sufficient number of functionaries — specialists appointed for the purpose. The representatives of Austria, however, cautiously urged that the surveillance of the national administration should be reserved to each government without any interference by an outside power. This objection indicates the difficulties which have to be met in an attempt to secure good faith and complete observance in the matter of international administrative treaties.

When all is said, it is plain that the real sanction for the international law thus created lies in the eventual exclusion from the union of a state which persistently neglects or refuses to fulfill its obligations. In some of the unions this sanction is amply sufficient to secure the careful observance of treaty obligations. An international union may be so necessary to the economic life of the member nations that exclusion from it would be almost a national calamity, an eventuality to be avoided at almost any cost.

The realization of this necessity, of the fact that economic life within the national state is dependent for its prosperity upon international cooperation and membership in international unions, serves as a balance to the ever-present desire to preserve sovereignty unimpaired and the freedom of national action unembarrassed. When at

the labor conference in 1890 it was proposed by the Swiss delegates that an international bureau of labor should be established, the British representatives objected on the ground that they could not put their labor legislation at the discretion of a foreign power. The feeling thus expressed is still a very strong impediment to the progress of international legislation. It seems, however, that the world is passing from this attitude to another and more liberal view of the situation. The view which national governments have generally taken regarding international cooperation is that everything must be avoided which would constitute a derogation of the complete rights of sovereignty. However, it makes a great deal of difference how this principle of caution is applied. When all international action is regarded as endangering national power, the question which governments will ask themselves when such action is proposed will take the following form: What is the least measure of concession which, with a due show of international courtesy, we can make to this demand? But after the usefulness and even necessity of international cooperation have emerged into view more and more clearly, and when the governments recognize that, in order to be completely useful to their subjects and citizens, they must join in these movements, they will ask themselves: What is the largest measure of aid and cooperation which we can give in this case with safety to our national interests? In other words, the international activity is no longer looked upon as an outside hostile force, to which only the least modicum of concession ought to be made; but it is regarded as a useful and necessary cooperative enterprise in which each state should join as far as its special circumstances will permit.

Although this is not the place to review the theory of sovereignty, it is evident that the old abstract view of sovereignty is no longer applicable to the conditions in a world where states are becoming more and more democratic and where the organization of interests is taking on an international aspect. It is undoubtedly a mistake to look upon sovereignty as an irreducible entity including the sum of all political and social power. It is therefore not justifiable to proclaim that sovereignty would be destroyed if any administrative activity of the national government is curtailed or transferred.

Sovereignty in the modern organization of the state is merely the focal point at which the political energies of the nation converge. It represents the strongest social purpose to which at certain times all other social purposes may have to yield. At present the paramount social purpose in the civilized world is still the maintenance of national power. It is the national organization upon which the safety of the material and moral interests of the world still reposes. But there are always large groups of interests which will not be dominated directly by the sovereign state, and whose activities are independent of the latter. The sovereign purpose, while it may eventually dominate, does not by any means at all times include, all other social purposes.

The creation of international groups of interests which we are witnessing may in the long run have a tendency to change this focalization of power. There may ultimately be created an international consciousness, interest, and organization so powerful as to make itself the paramount social force. This will not be the work of a single generation, nor will it be brought about through conscious political arrangements. If it does take effect, it will come as a result of inevitable groupings of social interest and power. Should it arrive, it will gradually make national sovereignty obsolete. Such a consummation, though its occurrence is not likely for some generations to come, could not be prevented by a narrow national policy which would attempt to block the normal and natural grouping and organization of interests the world over. We ought therefore not to speak of an abdication of sovereignty simply because one or several interests have been organized on an international basis. The national state still remains on the center of the stage. It merely utilizes these international organizations for the benefit of its own citizens and subjects.

It would also be a mistake — though this error has not always been avoided — to speak of sovereignty as a principle of international law. But is is plain that international law does not bestow sovereignty upon the state. On the contrary, it clearly regards sovereignty as a question of fact, and simply discusses the conditions under which a certain society may be said to have achieved a sufficient

political organization to be recognized as sovereign. Sovereign states, independent political persons, are the agents in international law whose importance is determined by the degree of vigor and efficiency with which they act in the community of nations, but not by their isolation and withdrawal from contact and cooperation. The main principle of international law is community of interests; upon this the law must be based if it is to be respected. Through membership in the international law union the personality of the state is developed, as is the individual through social life. These common interests are based on fact as undeniably as is the sovereign power. States have intercourse with one another; they and their citizens need it, and so it will be continued. The relations thus established must be given a normal, orderly form. Though, therefore, we as yet stop short of creating or admitting an international jurisdiction, we have long had an international procedure and we are fast developing international administrative law.[2]

Through the essential mutuality of the relations of civilized life the sovereign state is practically forced to avail itself of the advantages offered by international organization. It is plain that the individual, isolated national government is unable to secure for its citizens all the advantages of civilization. Relying merely upon the capacities and resources contained within its national territory, it can not offer to those dependent upon it the protection and the advantages which as citizens of the modern world they have a right to demand. If we consider the most fundamental and rudimentary duties of a civilized state, the protection against disease and crime, we immediately discover that the resources of a national administration are inadequate to afford complete protection to the citizens. The organization of crime rests on an international basis. Like anarchism, which we have already mentioned, the so-called white-slave trade illustrates the principles involved. The criminal laws of any individual state can not reach the offenders so as to protect its subjects against this most heinous exploitation. Nor is it possible for a state to protect itself against the influx of disease unless indeed

2 See, in this connection, Nippold, Fortbildung des Verfahrens in völkerr, Streitigkeiten, 1907, Chap. 1.

it should, in Chinese fashion, cut itself off entirely from commercial intercourse. In all these matters, it must rely upon cooperation with other national administrations, and only in a normal and well-regulated system of international police and sanitary administration can security be found. Similarly, a complete right to a patent or to the reproduction of a literary work can not be given by any national state, but it can result only from the common action of all civilized states. The moral right which the author of a book or an invention has, to be paid for the worth and utility contained in the product of his mind, can be protected only within narrow limits by an individual state. Its complete establishment is a matter for which universal legislative arrangements are necessary. Numerous examples of this kind will immediately occur to the reader. It is evident that there are growing groups of advantages which are obtained by men as members of civilized society rather than of any particular state. Such advantages the states owe it to their citizens to foster and develop, in order that the latter may enjoy what in reason they are entitled to. The state is powerless to create these advantages by its own unaided efforts. It can secure them for its citizens only through cooperation with other states.

International cooperation may at the present state of our civilization be represented as an ethical duty. No state has the right by headstrong aloofness from international movements to exclude its citizens from the advantages of civilization. But this ethical duty is reinforced by a very practical necessity, which is plain to any common-sense administration. As a matter of fact, the state which would isolate itself from the Postal Union or the Sanitary Union would act in as irrational a manner as an individual who would leave the abodes of civilization to pass his life in the unhealthy and inhospitable wilderness of a swamp. The laws created by international cooperation have an actual and potent sanction in the suffering and loss which are inevitably consequent upon their nonobservance. If we consider for a moment the international organ to which the most positive powers have been given, the Sugar Commission, we will recognize the workings of necessity in its creation. The far-reaching powers which have been given to this body did not result

from any preconceived plan that the establishment of an international authority of this kind would be desirable. On the contrary, they were forced upon the unwilling members of the conference by the conditions which had been brought about on the sugar-producing world by the practice of granting national bounties. The disastrous results produced by this species of national competition could be avoided only by the creation of a powerful international authority. The evils were so great that the measures for their removal presented themselves to the delegates in the form of unavoidable necessity; and they acted in accordance with the conclusion, although they tried to improve the appearance of their action by substituting the word "executory" for "obligatory" in speaking of the determinations to be made by the commission. The decided step forward which was thus taken in the organization of international unity was due not by any means to theoretical considerations, but to the presence of a practical condition which demanded specific action of this kind.

The development of international administration is favored in general by the principle that action will not be taken unless all the parties are agreed as to its desirability. In the older type of treaties between nations the purpose was the conciliation and compromise of conflicting interests. The new economic treaties strive to discover, on the contrary, a basis for cooperation, an essential equality of interests between all the nations upon which permanent international arrangements may be founded. The unanimity required for this kind of legislation can not, however, be permanently defeated by mere capricious opposition on the part of one or several states. When it is once clearly discovered that a basis for international cooperation exists, the reluctant states will generally be forced in the event to accede to the agreement, because they very soon find that exclusion from the advantages of the union means a serious loss to their own interests.

The effect of this new development, which we have been reviewing, upon the spirit and the methods of diplomacy can not but be salutary. Although diplomacy has not yet entirely lost its old popular reputation, according to which its methods were held to be synonymous with shrewdness, scheming, and chicane, it is clearly apparent that

a very different point of view of international relations is obtaining the leading influence in the diplomatic world. Instead of dealing only with the nice balancing of political interests, and attempting to gain more or less ephemeral advantages by shrewd negotiation, the new diplomacy makes its main purpose the establishment of a basis for frank cooperation among the nations in order that, through common action, advantages may be obtained which no isolated state could command if relying merely on its own resources. John Quincy Adams, in his Diary, says of a certain British diplomat: "The mediocrity of his talents has been one of the principal causes of his success;" and in the past merely neutral social virtues were indeed often accounted sufficient for diplomatic efficiency. The present makes more exacting requirements, and as the complexity of economic and social interests increases, efficient diplomats will have to be men of "great energy of mind, activity of research, and fertility of expedients," to use the words by which Adams expresses the qualities not so essential to ordinary diplomatic intercourse in his day. In order adequately to represent his nation, a minister ought to keep himself informed, through touch with expert opinion and with the progress of affairs, of the various world-wide economic, industrial, and intellectual activities, by which the welfare of his nation is intimately affected. A diplomat who masters these relations and keeps himself advised upon these movements will be able to secure many advantages for his own country, and he may, moreover, perform important services in helping to work out a basis for effective international cooperation in fields where such action is required by the very interests of his own nation.

The process of international organization frequently favors the expansion of the sphere of the national government. When interests are organized upon an international basis, the persons and associations concerned begin to see more clearly how their purposes may be furthered through state action. They consequently demand new legislation as well as the expansion of the administrative sphere, and urge the government to use its organs for the purpose of securing the greatest possible advantages for the individual citizen. The example of other nations is appealed to, and in every way the state is encour-

aged to make the fullest use of its powers. The organization of the agricultural interests upon an international basis, recent as it is, has already produced an insistent demand for greater state activity. The control which the state exercises over the conditions of labor is stimulated to greater action by the international agreements and conventions on that subject. In our country the agitation for a parcels-post service proceeds mostly from those persons who have realized the advantages which national industry may gain in foreign markets through the use of this method; so if this system should be introduced it would be due very largely to the importance of international relations.

It is very important to note that the organization of the economic and social activities of the world is being based upon the representation of interests in definite organs. While the parliamentary systems of the national states are still based on the abstract quantitative idea, the more natural system of interest representation is being used in international affairs. Undoubtedly the international movement will be strengthened by this fact, because a social or economic interest is an entity possessed of independent potentiality of action. If world organization spontaneously takes this form from the beginning, it will profit by the combined energies which all these interests represent.

The effect which international organization has exercised upon the methods and processes of national administration has been salutary. In the international conventions and congresses, methods are compared, criticisms and suggestions are made, and the best experience of the world is centralized; all of which may be turned to advantage by progressive national administrations. Moreover, a certain responsibility comes to be felt by the individual governments, over against each other. It would be embarrassing to be discovered in the use of antiquated and unscientific processes. The result is a greater efficiency of administrative action throughout the world. Moreover, through the public organization of scientific bodies, the latest results of pure and applied science are placed at the disposal of governments. The scientific branches in the administration of modern states are so important and their influence upon governmental

action is so direct that the organization of scientific work upon an international basis would in itself constitute a movement of prime importance.

It would be interesting to compare the internationalism of the present with the cosmopolitan movements which the world has seen at former periods of its history. A distinct difference separates the cosmopolitanism of the close of the eighteenth century from that of our own days. The rationalist cosmopolitanism is still current in much of our literature, although in practical affairs we have almost entirely outlived it in this particular form. It is individualistic and humanitarian, and recognizes no institutions between the individual and humanity. Every person is supposed to be inspired with a feeling of universal human brotherhood, and to strive for the abstract purposes of humanity. Cosmopolitanism of this kind caused Byron to weep when the enemy of his country was defeated, and Goethe to look on with indifference when the land of his fathers was invaded by the troops of Napoleon.

The cosmopolitanism of our days is concrete and practical. It rests upon the idea of cooperation in constantly expanding circles. For this purpose, adequate institutions must be created in order that international action may become real. The national state is not regarded as a superfluous obstacle. As international advantages are essential to the citizen, so the state remains necessary to the achievement of internationalism. The temper of the age is positive and constructive rather than given to idealism and speculation. The void which the old cosmopolitan ideal left between the individual and humanity is being filled up by the creation of institutions through which the individual may gradually be raised, by almost imperceptible degrees, from the narrow limits of personality to the broad aims of civilization. This internationalism respects ethnic and national entities as essential forms of social organization within their proper limits; just as the modern state respects the autonomy of towns, provinces, and member states, because out of these component elements it is itself constructed. As through the consciousness of the city and of the national state we gradually develop into a consciousness of world unity, we shall not be able to dispense with

the earlier psychic unities which at the present time lie back of national sovereignty and give it its force. The positive ideal of the world to-day is undoubtedly that the whole earth shall become a field of action open to every man, and that all the advantages which may be secured by the action of humanity throughout the world must be guaranteed to the citizens of each national sovereignty. A new grouping of social, economic, and political interests is being effected, in which, though indeed the national state will continue to hold a prominent place, public and associative action will be dominated to a large extent by forces and considerations which are broader than national life.

This development will also exercise a profound influence upon the attitude of mankind toward war. The older pacifism which is still current among the people is purely negative in character. It looks upon war as an entity, an evil purpose which must be broken down and inhibited. It overlooks the fact that war is only the symptom of a general condition in which too great emphasis is still laid upon local interests. It is evident that the only effective manner to remove the conditions to which the periodical occurrence of wars is due lies in the constructive building up of an international consciousness. It is equally apparent that such a consciousness can not be created out of nothing — that there must be back of it the development of a real unity of interest and feeling. It is through the creation of international organizations that a positive content of the feeling of a common humanity is being provided. The question of war will take care of itself, if only international interests and organizations continue to develop. The incentive to war will necessarily become weaker and weaker as the bonds of community between nations increase, such as are provided by communication agencies, by economic and industrial mutualism, and by scientific cooperation. The ruthless interruption of the activities common to all nations will become more and more painful. There are only two alternatives — either the ties which are thus being created will in time become so strong that no nation will think of interrupting them by war, or, if war is to be maintained as a solution of international conflicts, many of these relations will have to be excepted from its operations

and will have to be given a character of permanence so that they may continue in force even during hostile action between nations. Such an exemption of the common interests of mankind from interference would tend to confine the sufferings and dangers of war more and more to the active combatants, a result which would certainly be in accord with the dictates of humanity.

While the vista of possibilities thus unfolded is attractive and of great promise, it is nevertheless true that the movement which we have been considering would be retarded and injured by too great expectations and by action which would overlook the present just claims of local autonomy. The basis for cooperative action will gradually unfold itself; and as it does so, the principles of international legislation and administration will assume a character of inevitableness and will be recognized by the individual state as subserving its own interests. Individual initiative, to be effective, should be confined to assisting in the discovery and clear expression of such unquestioned bases for cooperation. Any attempt to urge states into action without showing a specific need, on the mere plea of the interest of internationalism, would be in so far to jeopardize the normal development and ultimate success of the great movement which is one of the most notable phenomena of the era in which we are living.

INTERNATIONAL UNIONS — GENERAL PRINCIPLES OF ORGANIZATION

At first sight there is little promise of accord in the details of organization and in the methods of the various international unions. They have been founded for a great variety of purposes, and deal with a multitude of interests representing every branch of human enterprise and endeavor, and having but little in common. There has been no general concerted plan among the governments with respect to the international movement which we are reviewing. The individual unions are rather the result of a spontaneous growth and crystallization of interests than of carefully elaborated general plans of action. Each one of them has naturally followed that course of development which its own specific purpose has indicated. But when all has been said and when all these reservations have been

made, there is yet discoverable an underlying unity in the movement which enables us to treat it as dominated by certain general principles, no matter how variegated and complicated its individual manifestations may be. In the course of the comparatively short life of the various international unions, there have indeed already been developed individual bodies of law, of method, and precedent, which may lay claim to being important and separate entities in the field of jurisprudence and administration — which consequently require separate study and are, as a matter of fact, dealt with in separate treatises. We need only think of such bodies of international legislation as the European railway freight law, the law of international copyrights, and the rules created by sanitary conventions. Yet, if we desire to form an estimate of the tendencies of the international movement and of its relations to national life, it will be necessary to attempt a general survey of the principles and methods employed. Such an attempt to arrive at a conception of what may be considered the normal action in this great movement will give us a criterion by which individual proposals and arrangements may be judged. It will also enable us to form a more accurate and better informed judgment of the general importance and tendencies of international administrative activities. Finally, it will protect us from the not uncommon error of exaggerating the importance of the functions created and of the positive powers which have been attributed to these new international organs.

Formation of unions

It is not always easy to tell with certitude whether the formation of a given union is due primarily to public or to private initiative. We note commonly an interaction of influences. Private associations or groups of individuals may discover the need for international action with regard to a certain interest and may undertake to urge the establishment of international treaties and administrative bodies. Quite generally, such persons will themselves organize upon an international basis, will hold international conferences, or congresses, where the feasibility of common policies and actions is discussed at length, and where proposals for public unions frequently originate.

Thus, certain states may finally be moved to take authoritative action in the matter in question, with the result that treaties and conventions will be concluded; or the state organs, desiring to come in closer touch with the efforts of private initiative, may associate themselves for awhile with the organizations already established; they may send official delegates to the conferences of the international associations, and out of this cooperation there may be evolved gradually a basis for public international action.

In a large number of cases, however, unions have been formed directly by public or state initiative. In individual cases, nations had realized the necessity of treaty arrangements on such subjects as the control of communication by telegraph, railway, or the mails. The individual treaties, multiplying year by year, containing many divergent provisions, had a tendency to render the subject unnecessarily complicated and difficult for the national administrations. Thus, there came about naturally a desire for unification on a general international basis. At other times the technical branches of the national administration discovered in their practical work the need for a general international treaty, and, setting the government in motion, they secured the direct establishment of international conventions and unions.

In exercising its public initiative, the state makes use both of technical experts belonging to its administration and of the general diplomatic personnel. Occasionally, the basis for a treaty is worked out entirely by technical experts — medical men in the case of sanitary treaties, railway officials in the case of transportation arrangements, etc. Ultimately, the results thus worked out may then be discussed from the point of view of general diplomatic and political arrangements by a conference of diplomatic representatives, which affixes the authoritative seal of signature and ratification. It is also a common practice to use both diplomatic and technical delegates in the same conference. In such cases, the state, of course, expects the diplomatic representative to give to the undertaking the prestige of his office and the assistance of his political experience, in order that the importance of the undertaking may be duly emphasized, and on the other hand the action proposed may be scrutinized from the

point of view of national diplomatic interests. The general experience of a trained diplomat on such occasions is also of no little benefit to the negotiators. The technical delegates, on the other hand, are held to furnish the knowledge upon which the substantive action of the conference will be based; the latter will necessarily draw upon the experience of these men with respect to the form to be given to the enactments and with respect to the technical information upon which all its action must be founded. It is unquestioned that the presence of the diplomatic element has frequently acted as a retarding influence. The technical delegates, having experienced the disadvantages of local differences in legislation, enter the conference with more enthusiasm for the international idea. The diplomat, being accustomed to consider every proposal from the point of view of an undiminished national freedom of action, will suspect dangers and will, in general, oppose any limitation upon the complete diplomatic freedom of the nation which he represents. We may note in passing that participation of the diplomatic representatives in the creation of these various international unions has made demands upon the profession which the older concept of diplomatic action failed to prepare them for. It has called out new powers and new capabilities, and as these interests grow and develop diplomacy will take on an entirely different aspect and will be less characterized by the narrow shrewdness, often bordering upon chicane, which was frequently the ideal of the older diplomacy.

In these matters, private initiative is of course far bolder and more optimistic than that of the state. It is not beset by the ever-present care to preserve national sovereignty intact, nor does it view every interest from the point of view of national organization. But the very lack of responsibility may at times also be a disadvantage, as is also the lack of technical experience when questions of detail in public administration are involved. Private initiative will frequently assume that international society has already been created, ignoring the fact that for the time being the realization of these international interests still depends upon the efficiency of the national administrations. In its zeal it is apt to forget the natural limitations upon administrative action, and for international purposes will

demand acts of governmental interference which it would scarcely tolerate if demanded from the point of view of national policy. The manner in which private initiative often loses the proper perspective is illustrated by the second congress against white slavery, which recommended that the postal administrations should not deliver *poste restante* mail to young girls without the consent of their parents. The difficulties of administration which such an arrangement would make necessary were certainly not given due consideration.

The great unions dealing with the communication interests were all the result primarily of public initiative. Treaties between two powers or a group of powers grew up and increased in numbers until, as pointed out above, the unification on an international basis presented itself as the only rational and practical solution of the difficulties. The definite suggestion of some of these unions, such as the Railway Freight Union, came indeed from private individuals, who worked out preliminary projects of action; but in all these cases the definite steps leading to the establishment of the unions were taken by public authorities. The great sanitary conventions of the last two decades were also the result of public initiative, although in these cases a long series of expert technical conferences preceded diplomatic action. In a similar way the unions dealing with the metric system, the suppression of the slave trade, the sugar bounties, and the publication of customs tariffs were created by public agencies, as was also the scientific union for the study of geodesy. The international unions dealing with the police of the high seas, as well as the organs dealing with specific local affairs, such as the Danube Commission and the Egyptian Caisse de la Dette, present themselves under the aspect of an extension of national organs of administration for the protection of interests beyond the boundaries of the state, and were therefore naturally the result of direct public initiative.

Private initiative leading toward the creation of international organizations has been most active and effective in connection with general economic interests in which the individual state administrations were not so necessarily and directly involved as they are in the control of communication, sanitation, and the police. In the three important fields of literary and industrial property, labor

legislation, and agriculture, the public unions which now exist are the result primarily of a determined and persistent private initiative. Two societies, the International Association for the Protection of Industrial Property and the International Literary and Artistic Association, agitated for the adequate protection of intellectual property and worked out definite projects for international conventions. Urged on by this initiative, individual states thereupon took the necessary steps to bring about the convocation of diplomatic conferences through which the subject-matter was given its authoritative form and through which the international organs dealing with these matters were created.

Among all the subjects concerning which international action has been taken, none perhaps illustrates more strikingly than labor legislation the necessity of such action — its naturalness, in fact — but at the same time the great difficulties which oppose themselves to the realization of any general plan of operation. Early in the development of the international movement, it was realized that national labor legislation would ultimately have to be supported by international understandings. It would evidently be impossible for an isolated nation to institute a system of perfect protection for its labor forces, while those nations who were its principal competitors in the industrial field continued in the use of a system under which labor forces were exhaustively exploited. Another reason for international arrangements in this matter was found in the fact that the labor supply is becoming more and more an international commodity. No longer based exclusively upon the native element in any one state, it is determined rather by importation and exportation of labor forces, whose temporary cooperation with the national laborers of itself necessitates some kind of international understanding on labor legislation. Various international associations of a private nature were formed, composed either of the direct representatives of labor striving for a more complete recognition of its needs, or of persons who interested themselves in the situation of the laborer from a scientific or humanitarian point of view. The labor interest, both in its economic and scientific aspect, therefore received an international organization which corresponded to the economic facts involved. A

strong sentiment for the founding of an international union of states dealing with labor problems was thus created. A number of governments sent delegates to the general assemblies of the International Association for the Legal Protection of Labor, giving this organization a quasi-public character. Finally, a diplomatic conference was convened in which certain proposals that had been worked out by the association were discussed and where certain general legislative principles were adopted. The first suggestion leading towards the establishment of the International Institute of Agriculture was made by a private person who brought his ideas to the attention of various governments. The suggestion was finally taken up by the King of Italy, and public initiative thus took the place of private suggestion. The ideas of the originator of this movement had also been discussed and endorsed by the International Association for Agriculture, a private organization. In this case, the action taken by the public authorities fell far short of what had been expected by the original sponsors of the movement. Instead of creating an organ empowered to take direct action for the protection of the various interests of agriculture, the diplomatic conference which acted as a constituent assembly in this matter did not go beyond creating an international intelligence bureau, the administrative functions of which are very limited.

Private initiative has also brought about the creation of international unions with respect to penitentiary science, seismology, the repression of the white-slave trade, and the great humanitarian enterprise of the International Red Cross Association.

After a union has once been created, admission to it is, as a rule, granted freely. Any state may therefore ordinarily acquire membership by merely declaring its adherence to the conventions concluded, and by assuming the burdens imposed by the international union. Such adherence is ordinarily notified to the "directing state" — the government in whose territory the international bureau is established — and by it communicated to the other member states. This method prevails in nearly all the international unions. An exceptional method is followed in those unions in which very special burdens are imposed upon the treaty states. Thus, in

the European Railway Freight Union the request of any state to be admitted to membership must be addressed to the directing state; it will be referred to, and reported on, by the bureau, submitted to the member states, and acted upon by them. Unanimous action of the latter is necessary in order that a new member may be admitted. In the Sugar Union, the request for admission must be acted on by the commission of the union, to whom it is transmitted through the Belgian Government, which is, in this case, the directing state. Admission to the Union for the Suppression of the Slave Trade may be made subject to certain conditions, which are applied upon motion of the treaty states. The common law of international unions may therefore be stated to be that the unions are open to all nations who are ready to assume the burdens imposed, and that the membership of all civilized nations will be encouraged. The purposes of these unions can, of course, be fulfilled best with a complete membership, including all the states of the world. Some of the unions, such as the Postal Union and the Agricultural Institute, closely approach this condition.

In certain unions membership is limited by natural causes or by the specific nature of the purpose for which the union has been created. The Union of American Republics is limited by a geographical fact. The European Railway Freight Union, the North Sea Fisheries Union, the Danube Convention, are other examples of limited purposes, which imply a limited membership.

Organization

The method of organization in the international unions tends towards uniformity. There is a general system which may be considered as the normal scheme of organization, although all its individual parts will not be found in every one of the unions. The tendency toward imitation has manifested itself in this field as in other fields of social enterprises. Methods of organization which, though established against great opposition, have subsequently proved their usefulness and thus justified their existence will naturally be imitated in the creation of new organizations.

The constituent assembly and general legislative organ of the

international union is the conference or congress. The use of the former term is becoming more general, although the meetings of the Postal Union are still called congresses, while in the case of the Agricultural Institute the term "general assembly" has been employed. The attempt to distinguish sharply between the term "congress" and "conference" seems to be futile. As used in general diplomatic language, the term congress may be said to refer to an important assembly of plenipotentiaries for the discussion and settlement of a definite political situation demanding immediate action by the powers. In this manner, the term is employed in connection with the Congress of Vienna, the Congress of Paris, the Congress of Berlin, etc. Congresses of this kind have in the past been called when, as the result of a great war, the political equilibrium had been destroyed and when vast interests were in the balance, requiring authoritative and immediate settlement. The term conference is used more generally where the subject of discussion is some specific interest or group of interests. A conference does not ordinarily work in the presence of a political situation which imposes upon it certain imperative demands of action. It rather deals with matters in which action seems advisable, in which mutual counsel should be had, but in which the present necessity of action is less urgent. The term is therefore applied even to the general Hague Conference, in which the most important interests of nations are discussed by plenipotentiaries. If the phraseology were determined by the importance of the interests involved and by the diplomatic character of the delegates, the term congress certainly should be applied to the meetings at The Hague. The only element which distinguishes these meetings from such as those to which the term congress has been applied in the past is the absence of an urgent political situation calling for immediate international action of a fundamental and pervading nature, such as that taken in 1815, or 1856, or 1878. It may, however, be that the term congress is destined to entire disuse in connection with the meetings of public representatives. At present the meetings of the Postal Union are still called congresses. The technical reason assigned for this usage is that the postal congress has the right and function of making changes in the original

convention; as distinguished, for instance, from the conference of the Telegraphic Union, which can not modify the original convention, but must confine its action to the provisions of the administrative *règlement.* The reason for this usage is, however, not of universal validity, because, like the postal congresses, other conferences of the union may inaugurate changes in the fundamental conventions; or meetings especially convoked for the purpose of making such changes are designated as conferences and not as congresses.

On the other hand, the usage is growing up of giving the name congress to large international meetings of private individuals. Thus, we speak of international scientific congresses. In this manner a change in our phraseology seems to be taking place; the more dignified and formal term congress being now used for meetings which have no public or authoritative character, whereas assemblies which enjoy diplomatic powers or a public initiative are almost uniformly designated as conferences.

The conference of an international union may either meet at periods the occurrence of which is definitely fixed in the convention, or, in a smaller number of unions, at a time determined by the preceding conference, or by the commission of the union. Thus, for instance, the conference of the Geodetic Union meets every three years, while that of the International Union of American States meets at a time determined by the governing board of the Bureau of American Republics. The conference acts both as a constituent assembly and as a legislature. As the original convention was the work of a conference, so, in general, changes in the convention or in additional acts may be inaugurated by the conference. The ordinary legislation of the union, contained in the *règlements,* is, of course, also subject to action by the conference, although in some cases the initiative in this matter is delegated to the commission. The conferences engage in discussions of questions of general policy, in the comparison of methods, and in the criticism of results. In the scientific unions, the advances made by the particular science, reports of investigations, and the determination of methods to be employed in future investigations, constitute the principal subjects of discussion, outside of the technical rules which may be made for the guidance of the executive organs.

For action in congresses and conferences, unanimity is the general rule. Readiness to subordinate national interests to the rule of a majority of states has as yet not been developed to any large extent. Each member of the union reserves to itself the right to approve or disapprove of any important change or innovation introduced in the organization. It is a general principle of the action of international unions that it must not bear upon subjects in which the solidarity of the nations interested is not fully recognized. As long as differences of interest are keenly felt, common action is impossible. Of course, it always remains open to the nations which desire a certain course of action, not yet favored by the totality of the membership, to form a restricted union for the specific purpose of enjoying among themselves the advantages of the arrangement proposed. If this action is really of such a nature as to be inherently advantageous to all states without distinction, the tendency is for such restricted unions to grow larger until they finally absorb the entire membership of the international union. In these matters, reliance can therefore not be placed upon the mere force of the majority. The only force that may be attributed to it is that inherent in the reason and practicalness of the ideas suggested, which may ultimately bring about unanimity among all the nations concerned. In order that any action should be had, it is therefore necessary that at least a modicum of common standing ground should be discovered. At times this is favored by the feeling that something must be done by an international conference in order that its existence may be justified.

There are certain exceptions to the rule requiring unanimity of votes in the international unions. In the general assembly of the Agricultural Institute, two-thirds of all votes constitute a quorum and can therefore take action. The Sugar Commission, which enjoys certain legislative powers, acts by a majority of votes. The same is true of the Superior Council of Health at Constantinople. In the Postal Union, a peculiar provision obtains. In the interval between conferences, suggestions for changes in the legislative arrangements of the union may be proposed by any three member states. Such proposals will then be submitted to all the states in the union.

In order that they may be adopted, unanimity is necessary only in proposals affecting the most important parts of the convention; with respect to other parts, a two-thirds vote, or even a simple majority, is sufficient.

In nearly all the unions a distinction is made between the convention and the *règlement.* The former determines the organization of the union, together with some of the fundamental principles upon which it is to operate. Thus, the postal convention, for instance, establishes the principle of free transit and rules defining the responsibility of the various administrations for losses of postal matter. The ordinary operations of the union are regulated by the *règlement,* which has the juristic character of an administrative ordinance. Changes in the convention necessitate diplomatic action, and require, therefore, greater formality as well as more extensive deliberation. The presence of diplomatic representatives is always necessary when a convention is to be changed. Changes in the *règlement,* however, may be made by technical delegates; or even in certain cases the function of determining the administrative rules may be delegated to a commission. The commission of the Sugar Union, for instance, elaborated the *règlement* (June 20, 1903) which makes detailed regulations of an administrative nature respecting the customs treatment of sugars, their transit, importation, etc. The administration of sanitary affairs in the ports of Turkey and the near East is determined largely by the *règlements* worked out by the councils of health at Constantinople and Alexandria.

The next organ of the international unions to be considered is the commission. The commission may be defined as a governing board whose duty it is to superintend the administrative work of the union, carried on by the bureau and other agencies. As just stated, the commissions are sometimes intrusted with the duty of preparing administrative regulations, or even, as in the case of the Sugar Union and the sanitary councils, of working out a complete code of administrative action. Their administrative control is therefore at times of such a nature as to assume a quasi-legislative character. The commissions also exercise a certain fiscal control over the expenses of the bureaus of the union, and in some cases arbitral func-

tions have been intrusted to them. The international commission is a recent development marking a more complete evolution of the international union. In the older unions, commissions have not been instituted, but the function of control which is exercised by the commission is in these intrusted to the government in whose territory the international bureau is situated.

The commission is composed of representatives of the treaty powers. In some of the commissions all of the treaty powers are represented. Thus, the governing board of the Bureau of American Republics is composed of the representatives of the Latin American republics at Washington, under the presidency of the American Secretary of State. The commissions of the Sugar Union and of the International Institute of Agriculture are also composed of representatives of all the treaty states. In some of the unions, however, the commission is elected by the conference, and contains a smaller number of members than the number of treaty states. Thus, in the Metrical Union the international commission is composed of fourteen members, half of the committee being renewed at each session of the conference — *i. e.*, every six years. The permanent commission of the Geodetic Union is composed of two ex-officio members and of nine others nominated by the conference. Four or five of the positions are refilled at each meeting of the conference, every three years. Other unions which make use of this organ are the Penitentiary Union, the Union for the Exploration of the Sea, Hygiene and Demography, Seismology, and Formulæ for Potent Drugs.

The requirement of unanimity is not usually applied to actions of the commissions. Even the Sugar Commission, which is intrusted with the most important powers, acts by a majority of votes. As the administrative and quasi-legislative functions of these commissions grow in importance, the principle of international action will be strengthened, especially on account of the absence of the majority requirement. The commission will therefore be seen to constitute an important step in advance in international organization, as implying that in some cases nations have come to recognize the necessity or desirability of subordinating their special wishes to the will of

the majority. Most of these unions, it is true, deal with scientific interests, and the functions of their commissions are therefore not apt to result in political action. But the establishment of the principle of majority action is nevertheless favored by this form of organization, and especially by the admission of that principle in the Sugar Union, which deals with most important economic and fiscal interests.

Practically all the unions make use of a central office or bureau as their chief administrative agency. The bureau is the connecting link between the various national administrations. It furnishes to them information about the interests of the particular union, acts as intermediary between the governments, and carries out the specific administrative duties assigned to it in the *règlement* of the union. Though the duties of the bureau are chiefly informational, instances are not lacking where more positive powers of administration and even arbitral functions have been intrusted to international bureaus. While the term "bureau" is the ordinary designation, the words "secretariate" or "office" are also occasionally employed. All the unions which use the commission employ also the bureau as an administrative agency; in addition, the following unions have international bureaus: Telegraphy, Postal, Railway Freight, Industrial and Literary Property, Publication of Customs Tariffs, Labor, Slave Trade, and Catalogue of Science.

It remains for us to consider the functions of the directing and supervising government — *i. e.*, the government in whose territory the international bureau is situated. It is the ordinary practice to locate the central office of an international union in a small neutral state. Thus far, Switzerland has been the favorite home of international unions, containing central offices of the Telegraphic, Postal, Railway, Industrial and Literary Property, Labor, and Penitentiary unions. The preference accorded to Switzerland over Belgium and Holland may be explained by the fact that Switzerland is perhaps considered more fully independent of extraneous influences than is either Belgium or Holland. It is also, as far as Europe is concerned, more centrally located. More recently, a number of bureaus have been located in Belgium (Customs Tariffs, Sugar, Slave Trade, Potent Drugs). The jealousy which formerly prevented the location of

bureaus in the territory of more powerful nations seems to be yielding somewhat at the present time, for in addition to the older scientific bureaus, the new Bureau of Hygiene has been established at Paris, while Germany harbors the central office of the two scientific unions of Seismology and Geodesy, and Italy has become the home of the International Institute of Agriculture. In the unions which have no commission or governing board — this is the case with most of the unions located in Switzerland — the regulation of the administrative organization of the bureau and the general supervision of its work is left to the directing government. The bureaus situated in Switzerland are under the control of one of the Swiss Departments, such as the Department of Post-Offices and Railways. The policy of Switzerland with respect to the civil service of these bureaus has been criticised, because of the somewhat narrow policy of confining appointments to these positions to Swiss subjects. The total advantage which Switzerland draws from this arrangement, however, is not very extensive, as the budgets of all these unions are exceedingly small. In Belgium, the Anti-Slavery and the Customs Tariffs bureaus are under the direct charge of the Foreign Office. The Bureau of American Republics comes under the control of the Government of the United States only inasmuch as the American Secretary of State is the president of the governing board of the bureau.

In unions which use the commission as the organ of control, the directing government simply exercises the function of a diplomatic intermediary between the treaty states and the bureau. Thus, for instance, communications to the Sugar Commission are made through the Belgian Government. There seems to be a certain reluctance to permit the international commissions or offices to establish direct relations with the treaty governments. They may indeed in some unions furnish information through routine correspondence, but more formal matters are usually communicated through the foreign office of the government in whose territory the bureau is situated. The Bureau of American Republics corresponds with the governments composing the union only through the diplomatic representatives of these governments in Washington. Direct correspondence with any government is permitted only in the absence of diplomatic representation at Washington.

Legislation

A general review of the field of legislation as occupied and developed by the international unions reveals that there are three classes of legislative arrangements in which all the legislative acts of unions may be grouped. The most notable of these classes contains the efforts which are made to bring about a unification of the substantive law governing any international interest. Uniformity of legislation is an ideal which under the present conditions of national life can be applied only to a limited number of general principles. Moreover, it is not in all fields of legislation that the process of international unification is at the present time considered as feasible, even in a partial form. There is, however, one branch of legislation in which a unifying activity is demanded by the most essential characteristics of modern civilization. The development of rapid communication has very nearly made the world into a unit in as far as the transmission of intelligence and the transportation of passengers and goods are concerned. Even before this advantage had been achieved, the convenience of having a uniform law in matters of transportation by sea and land was generally recognized. The recent developments already mentioned have only emphasized this desire for a uniform law of transportation. The most substantial achievement which has thus far resulted from the international movement is the creation of a railway freight code for the European continental states. The questions arising in transportation are here juristically treated upon a uniform basis with a result that the freight intercommunication between the continental states of Europe has been to a large extent freed from difficulties and annoyances. A determined effort is even at the present time being made to reduce the principles of the maritime law to a condition of uniformity. As the law merchant and the maritime law were originally international, or rather had the character of a world law independent of national jurisdiction, created by the spontaneous action of merchants, bankers, carriers, and shippers throughout the medieval world, even so it is hoped that at the present time, when the interests of communication have so clearly and definitely transcended national boundaries, we may again unify the maritime law and give it a world-wide currency. In the

conventions relating to the telegraphic and postal unions, certain general principles relating to duties and responsibilities of the administration have also been finally established. In some of the unions, the establishment of uniform principles of law for all the nations is indeed the prime motive of action. Thus, the international association for labor legislation works specifically toward the uniformity of labor-protection laws, and in the conventions already elaborated it is this principle which is applied to a certain limited field of labor regulation.

The second class of international legislation consists of administrative regulations. In this class, too, the ideal of uniformity is paramount — the processes of the various national administrations are to be simplified in a unifying spirit. But in addition to the unification of administrative processes, the legislation of this kind establishes certain new relations between the governments by which may be bound together administrations following in the management of their own affairs different rules of action.

The third class of international legislative arrangements rests upon a different idea. In this class it is not uniformity that is primarily sought to be achieved, but mutuality of advantages. No attempt is necessarily made to modify the details of the national administrations, but it is simply provided that the subjects of one of the treaty states shall be admitted to the advantages granted to the subjects of another, and *vice versa*. Thus, the unions for the protection of industrial and intellectual property have hitherto worked mainly with a purpose of obtaining a mutuality of advantages, so that even without any changes in the copyright law of a given state foreigners may be admitted to an enjoyment of the advantages under such legislation, in return for a similar benefit granted by their own sovereign state. But it must be noted that mutuality will after all rarely be the sole purpose of an international union. Even in the unions mentioned, the purpose of securing mutuality is accompanied by an effort to assure a minimum of protection for copyrights and patents in all the treaty states, and furthermore to arrive at a uniform interpretation of disputed questions in the law of copyrights, such as, for instance, the question of the nature of publication and of the

dependence of the original patent or copyright upon a copyright granted to the same person in a foreign country.

We may note in passing that it requires rather more of an effort to achieve uniformity of substantive law than to harmonize administrative methods and processes. The latter may be modified by mere executive orders, while a change in the substantive law of a state necessitates a far more formal act. The reaction of treaty arrangements upon the national systems of law and government is therefore far more powerful in the field of administrative action than in substantive civil law. In the scientific unions, the uniformity of processes of investigation constitutes, of course, the prime purpose of common action. The unifying tendencies of these organizations do not encounter the difficulties occasioned by national differences of administration nearly to the same extent as is the case in the unions dealing with political or economic interests. But also in the case of those unions which afford a protection against disease, such as the Sanitary Union or the union against phylloxera, no great difficulties will be encountered by the demand for uniformity when it is once made clear that the judgment of science has positively decided that certain actions are indispensable if a country is to be protected from invasion by disease. I do not mean to say that these unions will be free from the difficulties caused by national differences in administration, and by the tenacity with which local methods are maintained; yet their action will in general be less impeded by such considerations in a measure as their action incorporates the dictates of science, against which no appeal lies in matters of this kind.

The nature of the substantive rules created by international legislation is, as has already been indicated, characterized by simplicity and by the quality of being fundamentally important to the success of any course of action. Before a rule is given sanction by international treaty, its applicability and validity must have been tested to the complete satisfaction of the treaty states. Mere experimentation on such a vast scale is inadvisable. The consequences of legal arrangements must be tested either on a national scale, or in a more restricted international union, before general rules of a legal nature will commend themselves to a large group of states for permanent

adoption. And yet when the entire field of international legislation is surveyed, it is surprising what substantial bodies of law have already been created by such common agreement.

The nature of the rules created may be illustrated by the following examples: In the law of communication, the principle of freedom of transmission of telegrams, wireless messages, and letters has been established. In the European Freight Union, the duties of a common carrier are enforced in as far as the acceptance, care, and delivery of merchandise are concerned; moreover, the responsibilities of the carrier are strictly defined, so as to exclude national differences of interpretation. The Postal Union illustrates the process of international legislation quite completely. Only a few rules of practice of a very general character have been established by law for the entire union. The principal among these are the obligatory acceptance of mail matter, the rules concerning registry and indemnity for the loss of registered packages, the relations of the postal administrations to one another, and the charges to be made for international services. Other matters, also of general interest, are, in cases where a complete agreement has not yet been arrived at, regulated by special treaties, and their operation is confined to restricted unions. Among such special arrangements may be mentioned the introduction of especially low rates, declarations of the value of mail matter, the law of postal money orders, the parcels post, the collection of notes and other credits, subscriptions to papers through the post-offices, and the use of the identification book. All of these matters are administrative in their nature, but with respect to them general rules of action and responsibility must be established, whether for all nations, or for the members of a restricted union. Thus, the Postal Congress of Rome in 1906 finally established the general principle of the responsibility of postal administrations for the loss of registered mail matter.

The legislation of the Sanitary Union may be illustrated by the following details which are contained in the treaty of 1903: The national duty of notification, the declaring of quarantines and their durations, the measures of protection to be allowed an individual state with respect to the disinfection of passengers, merchandise, and

ships, and special dispositions regarding the Red Sea, Suez Canal, and Persian Gulf. The convention on labor legislation provides for uniform principles with respect to the forbidding of night labor by women and the use of white phosphorus in the industrial arts. The Sugar Union has limited the amount of duty to be levied upon imported sugar and has entirely forbidden the granting of bounties to sugar producers.

Administrative activities

The administrative activities of the international unions vary with the manifold purposes of the latter. Thus far, national governments have exhibited great reluctance against endowing the organs of the international unions with direct powers of action. As long as the union confines itself to establishing a means of communication between the governments, to giving an occasion for the periodical interchange of opinions and comparison of results, even the greatest upholder of national sovereignty will not discover any dangers in such arrangements. But once permit the organs thus created to make binding decisions or to take administrative action which the individual sovereignties are bound to respect, and an entirely different situation is created. Yet the needs of international intercourse have become so prominent that it has been found convenient in many cases to give a certain limited power of action, carefully guarded and well defined, to the international administrative organs.

Their general purpose is, of course, to serve as a link of communication between the contracting states in order that, should they desire to bring about any change in the administrative arrangements or in the relations between states in the matter covered by the respective union, they will have ready to their hand an organ through which their efforts may legally and properly be made. The bureaus of the unions are therefore quite generally charged with the duty of giving due form to demands for changes in the respective convention or *règlement*. More specific authoritative functions have been intrusted to a number of the bureaus. Thus, the Slave Trade Bureau at Zanzibar superintends the enforcement of the general anti-slavery act, which gives it a certain power of control over the

vessels furnished by the treaty powers for police duty in African waters. The Sanitary Councils of Constantinople and Alexandria exercise a direct administrative control over the various quarantine stations of the Levant and the Persian Gulf. The Mixed Commission of the Danube, the Caisse de la Dette, and the Macedonian Commission fulfill specific functions indicated by their local purposes. The Bureau of the American Republics has been charged with the duty of obtaining information for the governments of America which may be useful to them with regard to projected public works. The governing board of the bureau, moreover, fixes the date and program of future conferences. The International Patent Bureau at Berne, in behalf of a restricted union for this purpose, acts as a registry of trade-marks, which are thus made *ipso facto* valid in all the member states of the restricted union. The work of the Metric Bureau and of the bureaus of the scientific unions can be called administrative only in the sense that it contemplates the establishment of more adequate methods of investigation in the sciences concerned. The Metric Bureau, however, has a specific administrative duty of preserving the original standards of weights and measures, and of issuing to governments and associations duplicates of such standards carefully tested as to their accuracy.

More extensive and important administrative functions have been intrusted to the Sugar Commission. As already noted, it has the quasi-legislative function of preparing regulations for the customs administrations with a view of preventing the secret importation of bounty-fed sugars into the treaty states. The commission also decides upon requests for the admission of new members. In addition to these and other functions, the commission has the very important power of making certain determinations of fact on the basis of which the legislation of the treaty states must be modified under the provisions of the convention. Thus, the commission is instructed to ascertain if in any of the contracting states any sugar bounty is given; further, to determine the existence of bounties in noncontracting states and the amount of such bounties, with a view of applying the compensatory duties provided for in the treaty; and, finally, it may authorize the levy of a surcharge (not more than one

franc per hundred kilograms) by one treaty state against another, by whose sugar its markets are invaded to the injury of national production. The treaty not only fixes the maximum duties permissible on sugar imports, but it also establishes a general scale of countervailing duties to be levied against countries paying a bounty to their sugar producers. But all the determinations of fact upon which the levying of such duties is dependent are made the function of the Sugar Commission. It is difficult to define a function of this kind. It may perhaps be described as essentially judicial in that its main element is the determination of fact; but as it is a situation rather than an isolated fact which the commission is to determine, its power may in many cases be in its effect practically legislative, in that it may determine the duty of a certain administration to levy certain taxes or to make certain administrative arrangements. The functions attributed to the Sugar Commission constitute the greatest reach yet given to the powers of an international organ. The policy of granting such attributes was not discussed as a theoretical question, but the course of action was forced upon the treaty states by the situation of the sugar industry at the time when the treaty was concluded.

It is quite a general practice to give functions of a fiscal nature to the international bureaus and commissions. Sometimes accounts between different national administrations are to be settled. Thus, in the Postal Union, the bureau acts as a clearing house between the administrations and provides for the settlement of unsatisfied balances. In 1907, the amounts thus balanced by the Postal Bureau reached a total of 71,000,000 francs. In a similar way the bureau of the Railway Freight Union acts as a fiscal center for the collection of arrears and the settlement of balances between the administrations. The bureau for Industrial Property, which is charged with the special work of trade-mark registry for the restricted union, derives a direct income from this service, as it levies a fee of one hundred francs for the registry of a trade-mark and fifty francs for each additional trade-mark registered by the same proprietor at the same time. The proceeds from these fees are, after deduction of the expense of administration, divided among the members of the restricted union.

The governing board of the Bureau of American Republics deliberates on and fixes the annual budget of the bureau, which must be submitted to it by the director of that institution.

The financial support of the international bureaus and commissions is usually derived from direct contributions by the member states. In some instances, these contributions are made *pro rata,* according to the population of the member states (*e. g.,* American Union), or the expense may be borne in equal shares by all the members (*e. g.,* Sugar Union). In the Railway Union, the expenses are borne in proportion to the mileage of railways operated for international purposes in the various countries. Another method is to divide the member states into classes and to attribute to each class a certain number of units in the expenditure. Thus, the members of the Union for the Protection of Industrial Property are divided into six classes. Those belonging to the first class pay twenty-five units, those of the second class twenty units, and so on down to the sixth, which pay three units. The total annual expense of the union is divided by the total number of units, and the individual unit is then multiplied by the number associated with a particular class. A similar system is used in the International Institute of Agriculture. Here the states are given the choice as to which group they desire to range under. Stringent regulations covering default of payment are not always made, as the national self-respect of the member states is deemed a sufficient guaranty of payment. But in some cases a definite sanction is provided; in the Metric Union, for instance, the failure of a member state to pay its quota for three years in succession results in the striking of its name from the list of membership. It occasionally happens that the international unions receive special support from a particular nation, or from private sources. The American Union thus recently received the sum of $750,000 from Mr. Carnegie for the purpose of erecting a suitable building as a home for its bureau; and upon the establishment of the International Institute of Agriculture, the King of Italy made a very substantial donation for the purpose of assisting in its maintenance.

In some of the international unions, methods have been established for the arbitration of controverted questions. It is evident

that a complete organization of internationalism would involve the creation of international tribunals in which controversies with respect to the various interests represented might be heard and decided. The general opposition which the principle of obligatory arbitration has encountered has thus far prevented any far-reaching action in this matter. Nevertheless, in a number of instances, arrangements for arbitral settlement of controversies have been concluded, which may indeed be looked upon as important precedents in the general movement of arbitration. When, at the Second Hague Conference, the general question of arbitration was being discussed in committee, it was prominently suggested and seriously considered that all the interests which had been publicly organized upon an international basis should be made subject to arbitration procedure. This fact very well illustrates the connection between the establishment of the international unions and the growth of a general feeling of international community. It was not merely an accidental suggestion that was made at The Hague, but rather the announcement of a principle which takes account of the most salient facts in the present organization of the civilized world. If certain international interests have arrived at a stage where their importance is recognized to the extent that separate international institutions have been created to guard over them and develop them, it may well be argued that these very interests constitute the most natural subjects for international arbitration. If their administration has been made international and to a definite extent common among all the nations, the decision of controverted questions with respect to them may safely be left to an international organ. Although the opposition to the general principle of arbitration was still so strong upon this occasion that the above suggestion was not enacted in the form of a treaty, it nevertheless embodied a sound principle of international policy.

Turning, now, to the specific arrangements for arbitration which have already been instituted, we note that in the Postal Union the bureau is instructed, upon demand of the parties, to give advice on controverted questions. Moreover, it is provided for that questions concerning the responsibility of any administration for registered mail matter and disputed interpretations of the convention shall be

submitted to arbitration upon the instance of one of the parties, the arbitrators in such case being two or three impartial governments. This provision is of great interest in that it represents the first enactment by public authority of the requirement of compulsory arbitration. Restricted as it is in its sphere of application, it nevertheless contains the complete principle of compulsory arbitration without abatement, and therefore may well be cited as a notable precedent in the future development of that method of procedure.

In the Railway Union the central bureau is charged, at the demand of the parties to the controversy, to pronounce arbitral sentences in disputes between different railway administrations. The suggestion made in 1904 that this power should be extended to controversies between railway administrations and private persons was not adopted by the conference. We have already seen that the determination of facts made by the Sugar Commission may be considered as quasi-judicial in their nature; but in addition to this duty, the commission is charged to give advice on disputed questions at the request of the governments or their delegates. The convention for the regulation of wireless telegraphy also provides for the arbitration of controversies by disinterested parties. Up to 1907, in the Postal Union, twelve cases had been submitted to the bureau for advisory arbitration, and three had been decided definitely by arbitrators.

The most common function of the international bureaus is that of furnishing reliable and adequate information concerning the particular interest in question. This is the main function of such bureaus as that of Industrial and Literary Property, the American Republics, Customs Tariffs, Labor, Sugar, Agriculture, Hygiene, and the Slave Trade (Brussels). It was as purely informational agencies that most of these bureaus came into being. This apparently innocent function was the entering wedge for other and more important international attributes, but even considered entirely by itself it is by no means of small importance. As a basis for national legislation, impartial and reliable information about the subject-matter involved, from the abundant sources of international experience, may best be furnished through the central service of the various bureaus. A direction toward greater unity and rationalness may

thus be imparted to national legislation, so that it may avoid the difficulties and drawbacks of local variations and local ignorance of the broader conditions of legislative problems. World-wide information is the only sound basis for a growing uniformity of law. The administrative side of governments will, however, find the informational function of the international bureaus of even more constant and general advantage. An administrative office is reluctant to send letters of inquiry to a foreign government. It may prefer, out of political modesty or for other reasons, to rely upon private sources of information — limited, partial, and in many ways inadequate. A thoroughly effective international service of information ought to justify itself primarily through active assistance to administrative offices in the various treaty states. The publications which have from time to time or at regular periods been issued by the international bureaus have in most cases been of unquestioned advantage to governments and to the public.

Closely allied to the function of furnishing general and specific information is that of preparing matters for the conferences of the unions, a function which is intrusted to many of the international bureaus. The bureau of the Institute of Agriculture, for instance, is instructed to propose measures for the protection of the common interests of agriculture. The bureau of the International Union of American Republics has been directed to make special investigations of topics proposed for action by the International American Conference. Such reports must be prepared at a sufficient time in advance of the conference in order that the individual governments may examine the matter with a view of instructing their delegates on the basis of the facts set forth. Preparatory work of this kind is done also by the Railway Bureau and by the bureau of the Sugar Union.

As we consider the totality of administrative activities centered in the international unions, we again note the extreme reluctance which nations have hitherto felt toward endowing these organs with positive powers. It is very common to exaggerate the functions of these international institutions. The International Railway Bureau, for instance, is sometimes portrayed as in a measure controlling the various European railway administrations. In order not to receive a

mistaken impression, it is necessary to remember that these institutions are primarily organs of information and communication. Other functions, as we have seen, have occasionally been granted, but they are thus far exceptional rather than normal. They point to future possibilities of development rather than to general present achievements. We need only look at the small budgets of these international institutions in order to understand how unprepared are the national governments to give them a powerful backing and support. On an annual allowance of from 60,000 to 125,000 francs, such as the Swiss bureaus enjoy, a complicated administration can not be developed. It is the more remarkable, however, what has actually been accomplished with such limited means. Notwithstanding the limitation in functions and resources, it is unquestioned that the international bureaus have succeeded in making for themselves a prominent place in the modern civilized world, a place which they owe partly to the circumspection and wisdom with which their affairs have been managed; partly, however, also to the future importance which the intelligent public of the civilized world is beginning to attribute to the international organizations which these organs represent.

PAUL S. REINSCH.

CONCERNING THE INTERPRETATION OF TREATIES[1]

IN GENERAL

The interpretation of treaties is a part of the procedure of carrying out or realizing the act of contracting. This work would not be necessary if agreements between states were bare expressions of international good-will, like the arrangements of friendly monarchs to interchange visits. Because, however, treaties are deemed capable of realization and performance, the process is essential.[2]

The method of interpretation consists in finding out the connection made by the parties to an agreement, between the terms of their contract and the objects to which it is to be applied. This involves two steps. One is to ascertain what has been called the "standard of interpretation;" that is, the sense in which various terms are employed. The other is to learn what are the sources of interpretation; this is, to find out where one may turn for evidence of that sense.

As various standards of interpretation are available, it is obviously necessary to ascertain which one the contracting states may have adopted. A treaty may, for example, prohibit the citizens of one state from fishing within a specified distance of the bays of another state. To ascertain in what waters fishing is not permitted it is necessary to determine in what sense the term "bays" was employed; whether in the literal sense, according to the definition given in approved dictionaries, or in a sense, if there be one, peculiar to international law, or in one known only to the parties to the agreement. While contracting states may avail themselves of any standard of interpretation convenient to their purpose, no party to a

[1] This article embodies a small section of a treatise on International Law which is in preparation for publication by Messrs. Little, Brown & Company, Boston.

[2] See Wigmore, Evidence, IV, 3470.

treaty can rightly invoke one known only to itself.[3] It is the signification which the several parties to an agreement may be regarded as having attached to their words which is alone the subject of investigation.[4]

In order to ascertain the sense in which a word or clause is employed in a treaty it becomes necessary to search for sources of interpretation. For this purpose recourse may be had to extrinsic circumstances. The effort of search is not fettered by many prohibitive rules, which the common law, for example, applies when the same undertaking concerns the contracts of individual men. As Professor Westlake says:

> The important point is to get at the real intention of the parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence, but is not generally accepted in the civilized world.[5]

It is important to bear in mind that the final purpose of seeking to learn the intentions of contracting states is to ascertain the sense in which terms are employed. It is the contract which is the subject of interpretation, not the volition of the parties thereto. It may be clearly established that while certain expressions are used in a par-

[3] The common law does not permit such latitude in the interpretation of legal acts. The rule prohibiting reliance on a sense "disturbing a clear meaning" of a term is an illustration. See Wigmore, Evidence, IV, 3476.

[4] "When a treaty is executed in more than one language, each language being that of a contracting party, each document, so signed and attested, is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively." Moore, Int. L. Dig., V, 252, citing United States v. Arredondo, 6 Pet. 691, 710; also Mr. Hay, Secretary of State, to Mr. Beaupré, No. 331, Nov. 16, 1900, MS. Inst. Columbia, XIX, 123.

[5] Int. Law, I, 282.

"Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words — that is, their associations with things." Wigmore, Evidence, IV, 3499.

Among the systems of rules formulated for the interpretation of treaties, those of Vattel, Book II, Chap. XVII; Phillimore, II, 94–125; Hall (5th ed.), 335–343; and Woolsey, 173–174, have been frequently cited.

ticular sense, a contracting state, notwithstanding that fact, has given its consent with the desire and intention to accomplish a purpose or secure a right inconsistent therewith. Such an intention or volition is not decisive of the rights of the parties under their agreement. Says Professor Wigmore:

> Interpretation as a legal process is concerned with the *sense* of the word used, and not with the *will* to use that particular word.[6]

The situation is like that of two men, A and B, who may have agreed to use a particular code in their contracts by telegram. A, in response to an offer by B, telegraphed a word which according to the code signified his acceptance. A may have supposed that by so doing he was merely asking for a better price. The fact that he did not intend to accept the offer, but that he believed the word which he telegraphed signified something other than acceptance, is immaterial. Not by consulting A's intention or volition, but by reference to the code, are the rights of the parties to be determined; for the fact has been established that according to mutual understanding the code should be the standard of interpretation.

The demands which a state may make upon another at the time of entering into their contract, the facts known to their plenipotentiaries, the correspondence or interchange of views leading up to and forming a part of the final negotiations, may all be important. Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal intrusted with the duty of interpretation. When the fact is established that the parties adopted a particular standard of interpretation — that they used expressions with a particular signification of their own choice — it is immaterial how widely that signification may differ from any other.[7]

[6] Evidence, IV, 3471. See also Scott's Cases, Int. L., 426, note by the editor.

[7] The treaty between the United States and Switzerland of November 25, 1850, provided for most-favored-nation treatment "in the importation, exportation, and transit" of their respective products. In 1898 the Swiss Government claimed that by virtue of Articles VIII, IX, X, and XII it was entitled to demand for Swiss importations into the United States such concessions as were accorded French importations under a reciprocity agreement between the United States

An instructive case was decided by the umpire of the British-Venezuelan Commission, established in accordance with the terms of the protocol of February 13, 1903, providing for the arbitration of British claims before a mixed commission. Article III of that instrument declared that

> The Venezuelan Government admit their liability in cases where the claim is for injury to or wrongful seizure of property, and consequently the questions which the mixed commission will have to decide in such

and France of May 28, 1898. (Mr. Pioda, Swiss Minister, to Mr. Day, Secretary of State, June 29, 1898, U. S. For. Rel., 1899, 740). Mr. Day, Secretary of State, pointed out "that a reciprocity treaty is a bargain and not a favor, and that it therefore does not come within the scope of the most-favored-nation clause." (*Id.*, 740.) It was urged, however, by the Swiss Minister that according to the understanding of the signatory parties in 1850, expressly shown by the American plenipotentiary, Mr. Mann, who negotiated the treaty, that out of friendly regard for Switzerland no limitation should be attached to the most-favored-nation clause. (*Id.*, 742.) Mr. Hay, Secretary of State, in a note to the Swiss Minister, November 21, 1898, admitted that the American Minister who conducted the negotiations agreed to the interpretation advanced by Switzerland, that the treaty was ratified in both countries with the distinct understanding that it should apply to reciprocity treaties. He, therefore, concluded "under these circumstances we believe it to be our duty to acknowledge the equity of the reclamation presented by your Government. Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect." (*Id.*, 747–748.)

In Geofroy v. Riggs, 133 U. S. 258, at 271, the court says: "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." See also United States v. Payne, 8 Fed. Rep. 883, 892; Strother v. Lucas, 12 Pet. 410, 436; United States v. Arredondo, 6 Pet. 691, 710, 741.

According to the convention of January 24, 1903, between the United States and Great Britain for the settlement of the Alaskan boundary dispute before a joint tribunal, it was agreed that the court should consider certain articles of the Russian-British treaty of February 28/16, 1825, and of the Russian-American treaty of March 30/18, 1867, and that "the tribunal shall also take into consideration any action of the several governments or of their respective representatives preliminary or subsequent to the conclusion of said treaties so far as the same tends to show the original and effective understanding of the parties in respect to the limits of their several territorial jurisdictions under and by

cases will only be: (*a*) Whether the injury took place and whether the seizure was wrongful, and (*b*) if so, what amount of compensation is due.[8]

In behalf of Great Britain it was contended that by its agreement Venezuela had assumed liability for injury to or wrongful seizure of property respectively committed or taken by forces of unsuccessful rebels. Venezuela, however, asserted that liability was admitted only for such claims as were "just" according to international law, and that there was no assumption of liability for acts of revolution-

virtue of the provisions of said treaties." (U. S. For. Rel., 1903, 488, 491.) It was further agreed that seven specified questions as to the interpretation of the Russian-British treaty should be answered and decided by the tribunal. In the course of his instructive opinion on the fifth question Lord Alverstone, the president of the tribunal, said: "It is in my opinion correctly pointed out, on behalf of the United States, that the word 'coast' is an ambiguous term, and may be used in two, possibly more than two, senses. I think, therefore, we are not only entitled, but bound to ascertain as far as we can from the facts which were before the negotiators the sense in which they used the word 'coast' in the treaty. Before considering this latter view of the case, it is desirable to ascertain as far as possible from the treaty itself what it means, and what can be gathered from the language of the treaty alone. * * * This consideration, however, is not sufficient to solve the question; it still leaves open the interpretation of the word 'coast' to which the mountains were to be parallel." (Proceedings of the Alaskan Boundary Tribunal, I, Part I, 36, 37, 39.) See the opinions of the American members of the tribunal, Messrs. Root, Lodge, and Turner (*id.*, I, Part I, 43, 48–49); opinion of Sir. L. Jetté (*id.*, I, Part I, 65–79); Rules of Construction and Interpretation presented in argument of the United States (*id.*, V, Part I, 6–11); evidence to be considered in the American case (*id.*, V, Part I, 11). It is said in the United States counter-case that "the United States asserts that the intention of the parties to the treaty is vital to its true interpretation; that such intention between nations is the very essence of the agreement; and that any material variance from the intention must give place to an interpretation in accordance with it." (*Id.*, IV, Part I, 40.) In the counter-case of Great Britain it is said that "the function of the tribunal is to interpret the articles of the convention by ascertaining the intention and meaning thereof, and not to recast it. Any considerations showing that the words of the treaty must have been intended to bear a particular meaning, being a meaning which they are in themselves capable of bearing, may, of course, be legitimately presented." (*Id.*, IV, Part III, 6.) See also argument of Great Britain (*id.*, V, Part II, 37); oral argument of Mr. Taylor (*id.*, VII, 578–579); Mr. Robinson (*id.*, VII, 501–502, 506–507, 514–516); Mr. Watson (*id.*, VI, 363–364); Judge Dickinson (*id.*, VII, 731–732).

[8] Ralston's Reports, Venezuelan Arbitrations of 1903, 292.

ary troops without proof of any fault on the part of the titular government. In support of the British interpretation it was urged that the circumstances attending the signing of the protocol, particularly the fact that Venezuela entered into the arbitration agreement as a condition precedent to the lifting of the blockade of its ports by Great Britain and its allies, proved conclusively that the words of the compact should be given their broadest colloquial sense, and that therefore the admitted liability should cover acts of revolutionary as well as of governmental forces. It was not denied by the umpire, Mr. Plumley, that it might have been possible for the contracting states to use the words according to the British contention; nor that if such fact were established any rule of law would require him to disregard the sense which the parties themselves had attached to the terms of their own agreement.

In his search for sources of interpretation the umpire made a careful review of the circumstances leading up to the agreement. The diplomatic correspondence between the two Governments was rigidly examined. His conclusion was that "President Castro understood he was admitting the liability of his Government only for such claims as were 'just;' that Mr. Bowen (representing Venezuela) understood he was submitting to arbitration only the matters contained in the ultimatum of each of the allied powers;" that in none of the correspondence or conferences of the allies with Venezuela was there "a sentence, a phrase, or a word directly or indirectly making claim to indemnity for losses suffered through acts of insurgents or directly or indirectly making allusion thereto;" that while the British Government thought the terms of the agreement broad enough to include such claims, it could not invoke a construction which Venezuela neither knew of nor had reason to know of, and to which it therefore had never assented. "Hence the umpire holds that Venezuela did not specifically agree in the protocols to be subject to indemnities for the acts of insurgents." [9]

[9] The Aroa Mines (Ralston's Reports, Venezuelan Arbitrations of 1903, 344, 350, 383). See also the Crossman Case (*id.*, 298) and the De Lemos Case (*id.*, 302), both also decided by the umpire of the British-Venezuelan Commission. Identical expressions in the Italian-Venezuelan protocol of the same date were

Declarations made by the negotiators of a treaty at the time of exchange of ratifications, or subsequent thereto, concerning the sense

given like interpretation by Mr. Ralston, umpire of the Italian-Venezuelan Commission, in a well-considered and instructive opinion in the Sambiaggio Case (*id.*, 666, 679). But see the interpretation of the German-Venezuelan protocol by the umpire, General Duffield, in the Kummerow Case (*id.*, 526, 549); that of the Spanish-Venezuelan protocol by the umpire, Mr. Gutierrez-Otero, in the Padrón Case (*id.*, 923), and in the Mena Case (*id.*, 931).

Note also the following cases involving the interpretation of international agreements:

Case of Joseph Chourreau before the French and American Claims Commission, under the convention between the United States and France of January 15, 1880, and the decision of Mr. Felinghuysen, Secretary of State, as to the interpretation of the terms "territory" and "territorial jurisdiction" employed in the convention. (Moore, Int. Arbitrations, II, 1145, 1146, citing H. Ex. Doc. 235, 48th Cong., 2 sess., 16; also Boutwell's Report, 134.)

Opinion of the umpire, Sir Frederick W. A. Bruce, in the Capitation Tax Case, as to the power of the commission under the convention between the United States and Colombia of February 10, 1864, to determine whether a certain tax imposed by Panama was in violation of Articles II, III, and XXXV of the treaty between the United States and New Granada of December 12, 1846. (Moore, Int. Arbitrations, II, 1412.)

Opinion of Mr. Alexander S. Johnson, American commissioner of the joint commission under the British-American treaty of July 1, 1863, in the case of the Puget's Sound Agricultural Company concerning the interpretation of Article IV, treaty of June 15, 1846, between the United States and Great Britain. (Moore, Int. Arbitrations, I, 266.)

Sentence and award of Mr. C. A. Logan, arbitrator in the matter of the Chilean-Peruvian Alliance of December 5, 1865, under the Chilean-Peruvian protocol of March 2, 1874. (Moore, Int. Arbitrations, II, 2086.)

Opinion of Mr. John Little, commissioner in the case of William H. Aspinwall, executor of G. G. Howland and others, v. Venezuela, No. 18, United States and Venezuelan Claims Commission under convention of December 5, 1885, as to whether bonds of Venezuela were included among the claims to be submitted to arbitration before the commission. (Moore, Int. Arbitrations, IV, 3616.) Also opinion of Mr. John V. L. Findlay, commissioner (*id.*, 3642).

Decision of Mr. John Little, commissioner of the United States and Venezuelan Claims Commission, under the convention between the United States and Venezuela of December 5, 1885, as to the character of the proceedings under the treaty. (Moore, Int. Arbitrations, II, 1677.)

In the course of an elaborate opinion in the Manica arbitration between Great Britain and Portugal, under the *Acte de Compromis* of January 7, 1895, the arbitrator, Signor Paul Honoré Vigliani, said: "In our case the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who

in which it was understood that certain terms were employed are of value as sources of interpretation and should not be disregarded.[10]

have arranged it and the most favorable to the aim of the contract, obliges us to give to the word 'plateau' the broadest possible signification — that is to say, to require only the minimum normal altitude — so as to be able to affirm its existence as far as the Save, as the high contracting parties had supposed, and so as thus to render possible the application of the text of Article II of the treaty." (Moore, Int. Arbitrations, V, Appendix, 4985, 5011.)

In the case of Marryatt v. Wilson, 1 Bosan. & Puller, 435, 436, Chief Justice Eyre said: "We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states." Mr. Morse, the arbitrator in the Van Bokkelen Case, says that "Marryatt v. Wilson is strong authority for the proposition that the municipal tribunals of the country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction." (Moore, Int. Arbitrations, II, 1840.)

Opinion of the arbitrator, Mr. Alexander Porter Morse, in the case of Charles Adrian Van Bokkelen, under the protocol between the United States and Haiti of May 24, 1888, concerning the interpretation of the treaty between those States November 3, 1864. (Moore, Int. Arbitrations, II, 1813.)

Napier et al v. The Duke of Richmond, Journ. du. Pal., year 1839, II, 2, cited in the Van Bokkelen Case. (Moore, Int. Arbitrations, II, 1830.)

Case of Lewis S. Hargous before the United States and Mexican Claims Commission: Convention of April 11, 1839, concerning the scope of the powers of the commission under the convention, and the nature of claims for which liability was assumed. (Moore, Int. Arbitrations, II, 1267.)

Note the language of His Imperial Majesty the Emperor of Russia, interpreting Article I of the treaty of Ghent of December 24, 1814, as arbitrator under Article V of the convention between the United States and Great Britain, October 20, 1818; also the reasons given for the method of interpretation employed. (Moore, Int. Arbitrations, I, 359, 360.)

See also Goetze v. United States, 103 Fed. Rep. 72; Schultze v. Schultze, 144 Ill. 290; Adams v. Akerlund, 168 Ill. 632; Tucker v. Alexandroff, 183 U. S. 424.

[10] Prior to the exchange of ratifications of the Clayton-Bulwer treaty of 1850, Sir Henry Bulwer, the British Minister, made a declaration at the Department of State that his Government did not understand the engagements of that convention to apply to the British settlement at Honduras, or to its dependencies. Mr. Clayton, Secretary of State, in reply acknowledged that he understood British Honduras was not embraced in the treaty, at the same time declining to deny or affirm British title to the territory in question. The Secretary adverted to the fact that he had been informed by the Chairman of the Senate Committee on Foreign Relations, Mr. W. R. King, "that the Senate perfectly understood that the treaty did not include British Honduras." (H. Ex. Doc., 34th Cong.,

As the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formation of rules of interpretation can hardly serve a useful purpose. Times when proof is not to be had are rare. Even

1 Sess., 119; Moore, Int. Law Dig., III, 136–137.) Lord Clarendon, in the course of a note to Mr. Buchanan, May 2, 1854, said: "It was never in the contemplation of Her Majesty's Government, nor in that of the Government of the United States, that the treaty of 1850 should interfere in any way with Her Majesty's settlement at Belize or its dependencies." (Brit. & For. St. Pap., XLVI, 267; Moore, Int. Law Dig., III, 138.) The statements of Sir Henry Bulwer and Messrs. Clayton and King were clearly evidence of the fact asserted. For that purpose, and for that alone, they were entitled to consideration. It must be obvious that these gentlemen did not possess the power to amend a treaty between the United States and Great Britain. Owing, however, to their official positions they necessarily had precise knowledge of the fact in question. The evidential quality of their declarations in regard to it could not be ignored.

The reason why declarations of intention could not be given in aid of interpretation of the documents at common law, save in certain exceptional circumstances, was that they were considered dangerous for a jury who, not being expert in such matters, might attach to them too great weight. This objection is not applicable to the interpretation of agreements between states. Declarations of their plenipotentiaries, in so far as they indicate the sense in which the terms of a treaty are employed, are valuable not merely because they are enlightening, but also because they may be safely entrusted to the consideration of judges of international tribunals, or to ministers of state.

See also Mr. Marcy, Secretary of State, to Mr. Buchanan, December 30, 1853. Correspondence in Relation to the Proposed Interoceanic Canal (Washington, 1885), 247. Moore, Int. Law Dig., III, 137.

See also Lord Granville to Mr. West, Minister at Washington, December 30, 1882, U. S. For. Rel., 1883, 484; Memorandum of Mr. Olney, Secretary of State, 1896, on the Clayton-Bulwer treaty, Moore, Int. Law Dig., III, 203, 207; Crandall, Treaties, Their Making and Enforcement, 226–227; The Diamond Rings, 183 U. S. 176.

A commission under Article V of the Jay treaty of November 19, 1794, between the United States and Great Britain was established to decide what river was the River St. Croix intended by the treaty of 1782-1783, forming a part of the boundary between the United States and New Brunswick. There was at that time no river known as the St. Croix. The depositions of John Adams and John Jay, surviving negotiators of the treaty of 1782-1783, as well as a letter of Benjamin Franklin, also a negotiator of that treaty, were received in evidence as declarations concerning the original negotiations and the agreement itself. (Moore, Int. Arbitrations, I, 18–22.)

when it is wholly lacking it is dangerous to impute to a state assent to a particular significance of the words of a treaty. Where various inferences may be reasonably deduced from the conduct of the signatory parties under given circumstances, it is obviously unjust to assert as a rule that any one of them should be controlling. It is only the single reasonable inference which must be deduced from the conduct of the contracting parties which can be safely trusted. Circumstances compelling such an inference, however, sometimes exist. If, for example, it should appear that it would have been unreasonable, if not inconceivable, for a contracting state to agree to any but a particular signification of certain terms employed the necessary inference that such state had acted reasonably, if not wisely, will prevail, although such a signification may be at variance with the literal sense of the words of the compact.[11]

[11] In his award in the Reserved Fisheries Arbitration under Article I of the reciprocity treaty between the United States and Great Britain of June 5, 1854, the umpire, Mr. John Hamilton Gray, said: "But might it not also be assumed that where a country had, by a long series of public documents, legislative enactments, grants, and proclamations, defined certains waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions previously used, and adopted, would be mutually binding in interpreting the treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might." (Moore, Int. Arbitrations, I, 449, 458.)

See the opinion of Mr. Pinkney, commissioner, July 1, 1797, case of the ***Betsey***, Furlong, master; commission under Article VII, treaty between the United States and Great Britain, November 19, 1794, as to whether the commission, according to the treaty establishing it, was bound by the decision of the Lords Commissioners of Appeal affirming a sentence of condemnation by the Vice-Admiralty of Bermuda. Moore, Int. Arbitrations, III, 3180. In the course of his opinion Mr. Pinkney said: "Are we, then, to uphold an interpretation of this instrument which is not only unauthorized by its language, but is unsuitable to the subject of it, and at variance with the undoubted rights of one party and the duties of the other? What Great Britain could not properly demand, we are to *suppose* she did demand, what the United States ought to have insisted upon,

Again, it is usually held that if the general purposes of a treaty conflict with the literal signification of any of its terms, the former should prevail.[12] Frequently, in such cases, there is evidence that at least one of the parties is far from assenting to the literal sense of the expressions employed. The situation thus becomes one where the fact of assent is capable of proof.

When the sense in which the parties have used the terms of their agreement is ascertained, the legal effect of the terms employed is a problem for the solution of which the courts turn to the law of nations. Thus, for example, when an umpire concludes that the "claims" for which a contracting state assumes liability in a protocol of agreement refer to those which are just according to inter-

we are to *suppose* they abandoned, and this is to be done not only without evidence, but in direct contradiction to the declarations of the parties." (*Id.*, 3203–3204.)

See opinion of Sir Edward Thornton, umpire in the case of Don Rafael Aguirre v. The United States, No. 131: Convention between the United States and Mexico of July 4, 1868, as to the scope of the release given the United States by Mexico in Article II of the Gadsden treaty of December 30, 1853. (Moore, Int. Arbitrations, III, 2444.)

See also Mr. Ralston, umpire in the Sambiaggio Case, Italian-Venezuelan Claims Commission, under protocol of February 13, 1903, Ralston's Reports, 666, 688.

See the opinion of Pinkney, commissioner, case of the *Betsey*, Furlong, master, commission under Article VII, treaty between the United States and Great Britain of November 19, 1794, concerning the power of the arbitrators under the treaty to determine their own jurisdiction. (Moore, Int. Arbitrations, III, 2291; also opinion of the same commissioner in the case of the *Sally*, Hayes, master, *id.*, III, 2306.)

[12] Note the respective contentions of the United States and Great Britain concerning Article I, treaty of June 15, 1846, providing for the San Juan water boundary, and the award of the arbitrator, William I, German Emperor, under Articles XXXIV–XLII, treaty of May 8, 1871. (Moore, Int. Arbitrations, I, 213–214, 219–221, 229–231.) Crandall, Treaties, Their Making and Enforcement, 224.

See also the frequently cited case of the interpretation of Article IX of the treaty of Utrecht of 1713, between Great Britain and France, providing for the destruction of the port and fortifications at Dunkirk, given by Phillimore, II, § 73, and Hall (5th ed.), 339.

Note also interpretation of Article I of the convention of September 10, 1857, between the United States and New Granada by Mr. Upham, umpire of the United States and New Granada Joint Commission, as to the presentation of and liability for riot claims. (Moore, Int. Arbitrations, II, 1375–1378.)

national law, it then becomes his duty to ascertain what claims are valid according to that law.[13]

THE MOST-FAVORED-NATION CLAUSE

It is frequently provided in treaties that the citizens or subjects of the contracting states may enjoy the privileges accorded by either party to those of the most-favored nation.[14]

Writes Professor Moore:

> The general design of the most-favored-nation clauses, as they are expressed in various treaties, is to establish the principle of equality of treatment. * * * The test of whether this principle is violated by the concession of advantages to a particular nation, is not the form in which such concession is made, but the condition on which it is granted. The question is whether it is given for a price, and whether this price is in the nature of a substantial equivalent, and not of a mere evasion.[15]

The United States has always taken the stand that reciprocal commercial concessions are not gratuitous privileges, but given for a valuable consideration, and therefore not within the scope of the most-favored-nation clause.[16]

[13] Mr. Ralston, umpire in Sambiaggio Case, Italian-Venezeulan Claims Commission, 1903, and Plumley, umpire in Aroa Mines Case, British-Venezuelan Claims Commission, 1903. Ralston's Reports, 679 and 344, respectively.

[14] See, for example, Article I, treaty between the United States and Japan, November 22, 1894; Treaties in Force, 1904, 474.

[15] Hon. J. B. Moore, "Opinion Upon the Question Whether Congress Can Pass a Special Tariff Act for Cuba, Without Violating the Most-Favored-Nation Clause in Treaties with Other Countries." January 14, 1902, p. 4, citing opinion of Mr. Olney, Attorney-General, 21 Op. Attys.-Gen., 80, 82, 83.

[16] See correspondence between Mr. Adams, Secretary of State, and the French Minister, Mr. Hyde de Neuville, in the course of which Mr. Adams, in a communication December 23, 1817, said: "The eighth article of the treaty of cession stipulates that the ships of France shall be treated upon the footing of the most-favored nations in the ports of the ceded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent." Am. St. Papers, For. Rel., V, 152, 153, 163, 165, 171, 180, 186, 192.

See also Mr. Sherman, Secretary of State, to Mr. Buchanan, Minister to Argentine Republic, No. 303, January 11, 1898, and No. 336, April 9, 1898, MS. Inst. Arg. Rep., XVII, 306, 337; Moore Int. Law Dig., V, 277; Mr. Adee, Acting Secretary of State, to Russian Chargé d'Affaires *ad interim*, July 30, 1895, U. S. For. Rel., 1895, II, 1121; Moore, Int. Law Dig., V, 276. For further diplomatic

Great Britain, however, takes the position that concessions granted for a consideration may properly be claimed under the most-favored-nation clause.[17] To avoid dangers of construction the application of the clause is sometimes expressly restricted as in the treaty between Great Britain and Uruguay of July 15, 1899,[18] and in Article II of the Franco-German Treaty of Frankfort of May 10, 1871.[19]

Political relations between two states may be of a kind to afford in themselves a fair basis for commercial concessions, which other states could not justly claim the right to enjoy by reason of the most-favored-nation clause. Such relations were partly accountable for the terms of the treaty between the United States and Hawaii of January 30, 1875.[20] The relations between the United States and Cuba are of such a character as to enable the former to enact a special tariff act for the latter without violating the most-favored-nation clause in its treaties with other countries.[21]

correspondence indicating the view of the United States, see documents contained in Moore, Int. Law Dig., V, 257–288.

See also Bartram v. Robertson, 122 U. S. 116; Whitney v. Robertson, 124 U. S. 190; Thingvalla Line v. United States, 24 Ct. Cl. 255.

See F. de Martens, Droit International, II, 322; Ernest Lehr, in Rev. Gén. Dr. Int. Pub., year 1893, 315; Information Respecting Reciprocity and the Existing Treaties, by Hon. John A. Kasson, Washington, 1901; Joseph Rogers Herod, Favored Nation Treatment, 1901.

[17] See Earl Granville, Secretary of State for Foreign Affairs, to Mr. West, British Minister at Washington, February 12, 1885, Blue Book, Commercial No. 4 (1885), 21–22, Moore, Int. Law Dig., V, 270; Mr. Frelinghuysen, Secretary of State, to Mr. Bingham, Minister to Japan, June 11, 1884, MS. Inst. Japan, III, 253, Moore, Int. Law Dig., V, 267, note.

See also Sir Thomas Barclay, in "The Effect of the Most-Favoured-Nation Clause in Treaties," a paper read before the Portland Conference of the International Law Association, 1907, Yale Law Journ., XVII, 26.

[18] N. R. G., 2 ser., XXX, 266.

[19] N. R. G., XIX, 688.

[20] This fact was recognized by Germany. In a separate article of its treaty with Hawaii of September 19, 1879, it was declared that "certain relations of proximity and other considerations" rendered important the negotiation of the American-Hawaiian compact, the provisions of which should not be invoked by the contracting parties. See Moore, Int. Law Dig., V, 263–267, concerning diplomatic discussions resulting from the American-Hawaiian treaty. See also Bartram v. Robertson, 122 U. S. 116; Whitney v. Robertson, 21 Fed. Rep. 566.

[21] "We have in the case of the United States and Cuba a remarkable example

A law providing for the levying of a lower rate of tonnage dues on vessels sailing from certain foreign places, such as North America, Central America, the West Indies, the Bahamas, the Bermudas, the Hawaiian Islands, or Newfoundland, may well be protested against by a state whose ports are outside of the specified area, and whose commerce with the legislating state is, by treaty, to be accorded the most-favored-nation treatment. The fact that such discrimination is geographical rather than national, embracing any state in the specified zone, does not satisfy the objection that the states on whose vessels the lighter dues are levied are more favored in respect to commerce than those whose vessels must pay a greater sum.[22]

The payment by a state of a bounty on the exportation of an article produced or manufactured in its territory can not on principle justify another state into which such article is imported in imposing an additional duty, where the commerce between such states is by agreement to receive most-favored-nation treatment.[23] "It is

of those special and exceptional relations, physical and political, which, not being estimable simply in terms of commerce, are universally recognized as the surest foundation for the mutual exchange of exclusive advantages; relations, moreover, which are expressed in valid public acts, whose legal effect all nations have acknowledged." Hon. J. B. Moore, in opinion cited, 14.

See also Mr. Bayard, Secretary of State, to Mr. Robinson, consul at Tamatave, No. 129, May 12, 1886, 117 MS. Desp. to Consuls, 571. Moore, Int. Law Dig., V, 313.

[22] See Report of Mr. Bayard, Secretary of State, to the President, January 14, 1889, concerning operation of act of Congress of June 26, 1884, and June 19, 1886. H. Ex. Doc. 74, 50th Cong., 2d Sess.; Moore, Int. Law Dig., V, 288.

See correspondence between the United States and Colombia as to whether a proclamation of President Harrison of March 15, 1892, suspending the free admission into the United States of certain articles produced in or exported from Colombia, in accordance with section 3 of the McKinley Act of October 1, 1890, should be regarded as a violation of the treaty between the United States and New Granada of December 12, 1846, U. S. For. Rel., 1894, Append. I, 451–503; U. S. For. Rel., 1894, 198–199.

[23] See German Memorandum on Additional Duty on German Sugar, July 16, 1894; U. S. For. Rel., 1894, 234; Report of Mr. Gresham, Secretary of State, to the President, October 12, 1894, U. S. For. Rel., 1894, 236.

See also President Cleveland, Annual Message, December 3, 1894, U. S. For. Rel., 1894, ix–x; Mr. Olney, Attorney-General, November 13, 1894, 21 Op. Attys.-Gen., 80, 82; Mr. Sherman, Secretary of State, to the German Chargé d'Affaires

understood, when treaties against discriminating duties are made, that governments reserve the right to favor (by duties or by bounties) their own domestic production or manufacture." [24]

The most-favored-nation clause is frequently employed to describe the scope of privileges to be accorded consular officers of the contracting states. It has been held that this clause is applicable to any rights and privileges specifically conferred upon such officers by the provisions of particular conventions, such as those contained in Article IX of the treaty between the United States and the Argentine Republic of July 27, 1853,[25] giving consuls the right to intervene in the administration of the intestate estates of their deceased countrymen.[26]

The most-favored-nation clause is not regarded as applicable to many particular provisions of agreements, such as to engagements

ad interim, September 22, 1897, U. S. For. Rel., 1897, 178; Mr. Hengelmüller, Austro-Hungarian Minister at Washington, to Mr. Sherman, April 13, 1897, U. S. For. Rel., 1897, 22; act of Congress of July 24, 1897 (30 Stat. at L. 205); Downs v. United States, 187 U. S. 496. An excellent abstract of the correspondence between Great Britain and Russia "Respecting the Interpretation of the Most-Favoured-Nation Clause in Connection with Countervailing Duties on Bounty-Fed Sugar." (Parliamentary Papers, Commercial No. 1 (1903), is given in Moore, Int. Law Dig., V, 307–309.

[24] Mr. Gresham, Secretary of State, in Report cited U. S. For. Rel., 1894, 236, 239.

[25] Treaties in Force, 1904, 27.

[26] In re Wyman, 191 Mass. 276; In re Fattosini's Estate, 33 N. Y. Misc. 18.

See also Mr. Olney, Secretary of State, to Mr. Dupuy de Lôme, Spanish Minister, September 26, 1895, and October 11, 1895, claiming by virtue of the most-favored-nation clause of Article XIX of the treaty between the United States and Spain, of October 27, 1795, the benefit of Article IX of the Spanish-German consular treaty of February 22, 1870. U. S. For. Rel., 1895, II, 1210 and 1212; Mr. Speed, Attorney-General, June 26, 1866, 11 Op. Attys.-Gen. 508.

It is stated in the Regulations of the Consular Service of the United States, 1896, paragraph 78, that in those countries, which are specified, with whom the United States has entered into consular treaties containing the most-favored nation clause, "consuls of the United States are entitled to claim as full rights and privileges as have been granted to consuls of other nations."

But see Mr. Buchanan, Secretary of State, to the Chevalier Hülsemann, May 18, 1846, MS. Notes to German States, VI, 130; Moore Int. Law Dig., V, 261. Also note, Mr. Hay, Secretary of State, to Mr. Wolcott, U. S. S., February 3, 1900, 242, MS. Dom. Let., 522; Moore, Int. Law Dig., V, 123.

of extradition,[27] or to an agreement concerning what should be regarded as contraband,[28] or to the provisions of a pilot law of the United States excepting from pilotage American coastwise vessels.[29]

CHARLES CHENEY HYDE.

[27] "Engagements of extradition, whether of fugitives from justice or from service, stand in each case on particular stipulations of treaty, and are not to be inferred from the 'favoured-nation' clause in treaties." Moore, Int. Law Dig., V, 311, citing Cushing, Attorney-General, October 14, 1853, 6 Op. Attys.-Gen. 148, 156.

[28] The James and William, 37 Ct. Cl. 303.

[29] Olsen v. Smith (1904), 195 U. S. 332, 344.

THE INTERCANTONAL LAW OF SWITZERLAND (SWISS INTERSTATE LAW)

I. CHARACTER AND MEANING OF INTERSTATE LAW [1]

Interstate law is the law governing the relations between the members of a confederation of states with each other, in so far as these are opposed to each other as states. It is distinguished from international law because its subjects are not sovereigns, but belong to a governed body of a superordinate commonwealth. As opposed to federal state law it is characterized by having for its object not relations of supremacy and subordination between the federation and its members, but relations of coordination between the members of the federal state. Interstate law is an intermediary conception between the law of confederations and the law of nations.

Interstate law is above all of importance for confederations of states — that is, in the contemporary political world, only for federal states. And even in federal states this law is only so far to be met with, where the federal constitution has not deprived the states of their character of state and of their capacity for interstate intercourse. As the aim of federal states is precisely to put a strong, uniform, national organization in the place of the imperfect inter-

[1] Interstate law in contradistinction to international law signifies the law between the states of a compound state, particularly of a federal state, while international law relates to the law between nations, viz, fundamental sovereign states. There is no expression either in the German or in the French or Italian language which will precisely correspond to the American idea interstate. For the Swiss constitutional law there is of course an expression which exactly corresponds to the American idea interstate — intercantonal — the "states" of the Swiss Federal State being called Cantons. This term, however, is only applicable to Switzerland. It is precisely identical with the more general term interstate, with which it is used here without distinction referring to Switzerland.

To-day the "states" of Switzerland are regularly called Cantons, and more rarely "Stände" (old German term for political body). Before the Helvetic revolution the states of the Confederacy were termed "Orte," inasmuch as they were complete sovereign members of the Confederation.

national law relations of the confederated states, the range of matters to which interstate law is applicable and accordingly the practical importance of this law are limited. Nevertheless, it forms a more or less important part of the public right of every federal state.

However, interstate law has not only interest for the federal states but also for other countries, for it shows us a higher system of international law, so to speak: an international law having its sanction not in the loyalty of those bound by custom and treaty and in the *ultima ratio* of war, but in a developed judicial and executive power. The special forms of interstate law depending on the existence of a real national executive power will, of course, always remain irreconcilable with the existence of pure international law, but other interstate institutions could perhaps be typical up to a certain degree for the further formation of international law. The tendency of contemporary international law is more and more towards an association of states not only on the ground of the administration of common economic interests but also upon that of justice. At this point it is well to remark that the American delegation to the Second Peace Conference, upon the introduction of a project for a "Cour de justice arbitrale," also brought before the conference Article XIX of the Constitution of the Confederated States of 1777.

Interstate law takes on a different status in the various federal states of the present time according to the independence left to the members of the confederacy by the constitution.

The Constitution of the United States has sought to assure the liberties of the States by means of a sharp restriction of competency of the confederation toward the States and by making a revision of the Constitution difficult, but it has at the same time almost entirely deprived the States of their position as international subjects. The case is a similar one with regard to the constitutions of Latin America and of the British self-governing colonies, which were fashioned upon the North American model. It is different in the German Empire. There the Constitution is flexible and the Empire has repeatedly increased its competency, making it in many respects the most united federal state. The States have — only in a few respects,

however — been nominally robbed of their international capacities. In so far as the interests of the Empire are not opposed to their treaties and laws, they have the power to make treaties among themselves or with foreign nations; they can even have diplomatic intercourse. This is, however, of practical importance to-day only in a limited sphere; it is a concession to old tradition and to the monarchical principle of the sovereignty of the confederate princes.

An intermediary stand between the American and the German system is offered by the Swiss Federal Constitution of 1848 and also the revised Constitution of 1874. According to this the strength of the National Government is assured by a relatively easily obtained revision of the Constitution, which, however, is sharply differentiated from the ordinary federal promulgation of law. On the other hand, the character of state of the Cantons, the Swiss "states," is left to them as much as possible, at least with regard to their mutual relations. This is shown by the fact that only through the intervention of the Federal Council can the Cantons enter into agreements with foreign countries about the administration of public property, border, and police intercourse. But the competency of the Cantons (powers of the states) reaches much farther in their mutual relations. Here, the Cantons are entitled to make, without the interference of Federal authorities, contracts about all matters coming within the powers of the states. The rights and duties arising through these contracts are to be classed according to international law, and the Federal tribunal, which as court of justice has under it the jurisdiction of the disputes between Cantons, has already repeatedly proclaimed that the relations of the Cantons among themselves are to be judged by the fundamental principles of the law of nations in so far as no Federal decrees are opposed to it.

The legal maxims which apply to the relations of the Cantons among themselves can be classed, on the ground of the modern Swiss Federal public law, in the following way, which is also applicable in substance to other federal states:

1. The Federal laws establishing a national system for affairs, which would be regulated among the Cantons by common international law and state agreements if these were sovereign states. To

these belong the stipulation of the Constitution that Switzerland form only one territory with regard to customs duties; also that the free right of settling in any community of any state be given all Swiss citizens, etc. On these grounds the character of the Cantons as states in their mutual relations is entirely taken away from them.

2. The Federal laws determining the competency and capacity of action of the Cantons in their mutual relations; the right of concluding treaties, the prohibition of political contracts or secession leagues, the decree against violence, the guaranty of the independence and territory of the Canton through the Confederation. To these belong also the stipulations of the Constitution as to the competency of the Federal tribunal to decide upon questions of intercantonal differences, both public and private; the control of the Federal Council and of the Federal Assembly over intercantonal agreements, and the cooperation of the Federal executive power for the carrying out of intercantonal agreements (formal intercantonal Federal laws).

3. The Federal laws governing the legal material relations of the Cantons to each other as states; the decree against the double taxation of the same object of duty in different Cantons; intercantonal legal cooperation in civil and criminal matters (*e. g.*, extradition, execution of civil sentences, etc.). Here Federal municipal laws take the place of international, viz, interstate legal maxims (material intercantonal Federal law).

4. The decrees of the purely intercantonal law, namely:

(*a*) Intercantonal agreements;

(*b*) Common international law for those conditions not coming under the head of Federal laws or under the laws of intercantonal contracts.

Of these four classes the first does not belong to interstate law; the essence of these legal maxims consists precisely in eliminating the system of a number of small states in the interest of national power and unity. The fourth class is diametrically opposed to the latter, for it is lacking in national unity; there the Cantons can wield justice by treaties, just as sovereign states, or put it to the issue of the maxims of common international law. This purely

intercantonal or interstate law is merely international law or particular law established by treaties and is of no especial interest here. What is original are the statutes of the interstate law which are promulgated by the Confederation and determine the relations of the Cantons with each other. It is with these norms, different and characteristic in every state association and every federal state, that we shall deal with mainly in the following. However, before we enter into a description of the Swiss interstate law of to-day, of the intercantonal law, it will be well to cast a glance over the historical development of this law.

Historically, Swiss interstate law can only be understood as a relic of former conditions. That does not mean, however, that it only has the character of a relic without capacity for life and motive for existence. Intercantonal law has changed together with the transformations of the league and developed organically with it. A large part of the Federal law of to-day has passed through the more incomplete form of interstate law.

The political history of Switzerland is divided, as well with regard to the national whole as to the separate Cantons, into two great periods. The great turning point is the year 1798, when, as a result of the French Revolution and through the immediate interference of the French Republic, the old Confederation, with its system of different leagues, protectorates, "gemeinen Herrschaften" (common subject territories), was destroyed and the manifold democratic, aristocratic, and monarchical constitutions of the individual members of the Confederacy were swept away. In its place the Helvetic unitary State was erected on the foundation of the sovereignty of the people. This Helvetic Republic, however, only lasted five years. By the Mediation Constitution of 1803, forced upon Switzerland by Bonaparte, then First Consul, Switzerland was again changed back into a compound state, viz, a federal state, and the Cantons were again made states. After the downfall of the Napoleonic Empire (1813) and under the influence of the reaction of that period, the Constitution of the Federal State of 1803 was replaced by a simple Confederacy. However, in opposition to the anorganic conditions before 1798, Switzerland yet remained a Confederacy held

together by uniform institutions. The Confederacy of 1815 lasted until the year 1848. As in the United States in the war of secession, thus also in Switzerland in the year 1847 there was a secession to fight against; it was the so-called "Sonderbund." The Federal treaty of 1815 had proved too weak to hold together the Cantons which, notably through religious questions, had come into conflict with each other. Therefore, a powerful national Government had to be created, which could give to Switzerland necessary strength and unity on the outside and firm coherence on the inside. This was reached through the Federal Constitution of 1848, which is based mainly on the same principles as the Constitution of the United States. This Constitution has since then been revised, at several times, especially by the total revision of 1874, and always in the sense of broadening the competencies of the Federal Government at the cost of the Cantons and of strengthening the immediate supremacy of the people at the expense of purely representative government. The fundamental relations between the Confederacy and the Cantons and of the Cantons among themselves, however, have remained unchanged.

II. HISTORICAL DEVELOPMENT (1291–1848)

The development of the Swiss Cantons into states and the origin of the Swiss Confederation is not the result of a single historical event, but the outcome of a long development. The Cantons of the present day were, in the eighteenth century, a part of the German Empire. Some of them were cities subject to the Emperor alone; others were a part of duchies, counties, and other possessions of territorial lords; others were associations of free peasants. The measure of their self-government varied a great deal; they were not states in the same sense as to-day, not even in that of the Middle Ages. In the thirteenth century, during the interregnum of 1250–1273, the German realm had completely ceased to represent an effective sovereignty such as protects the rights of the people, and the Habsburg family, who rose to the Throne with Rudolph I (1273), did not carry out national, imperial policies, but an expansive system of Austrian home policies, so that the communities menaced thereby

were forced to assure their possessions and liberties by leagues. The cities and territories of the Switzerland of to-day were forced to recur to such measures of self-aid because the house of Austria, whose political ballast was originally in Switzerland, was working systematically for the consolidation of its possessions there.

Thus, on the 1st of August, 1291, a perpetual league was concluded between the three forest Cantons, Uri, Schwyz, and Unterwalden, which may be considered as the foundation of the Swiss Confederation. It was a defensive alliance directed against the threatening encroachments of the Hapsburgs, whose acquired rights, however, were recognized in the league. Furthermore, the league aimed, by penal and legal procedures, to strengthen public security, which, owing to the weakness of the imperial power, was no longer sufficiently protected.

The stipulation made in articles 5 and 12 is also worthy of mention and reads as follows:

> If dissension shall arise between any of the confederates, prudent men of the Confederation shall come together to settle the dispute between the parties as shall seem right to them, and the party which rejects their judgment shall be an enemy to the other confederates. If war or discord shall arise among any of the confederates, and one contending party refuses to accept proffered justice or satisfaction, the confederates are bound to assist the other party.[2]

These stipulations of the treaty of 1291 may be considered as the beginning of the modern system of international arbitration. Other leagues of the Middle Ages also contained clauses of arbitration, but none of these treaties has held until modern times. It is also worthy of notice that the law of the treaty of 1291 not only provides for an obligatory jurisdiction, but also a collective guaranty for the carrying out of the award.

In the period from 1291 until 1513 the Confederation was successively enlarged through the accession of several towns and territories. From 1513 to 1798 the Confederation was composed of thirteen "Orte," that is, thirteen states possessing every qualification

[2] English translation taken from J. M. Vincent, Government in Switzerland — New York, 1900.

required. Aside from these, there were the so-called "Zugewandte Orte" (allied states). A great part of modern Switzerland was then deprived of political independence because it was under the common rule of a more or less large number of other states.

The states and allied states accepted a different legal status towards foreign nations. Among the concluding parties of the first leagues there were imperial and territorial towns and estates; and when, after the victorious war of the Swiss against the German Empire in 1499, all "Orte" (states) had become really sovereign states there were still among the allied states nonsovereign communities and territorial lords, especially members of the German Empire. It was not, however, only the political status of the individual members of old Switzerland which offered a varied picture, but the federal relations among them likewise differed entirely. There was no unitary federal treaty, but a system of leagues. The leagues of the sovereign states among each other were sharply defined from those with the mere allied states. But also among the leagues of the "Orte" there again existed differences; those which had joined later had in part lesser rights. Moreover, every "Ort" was not even allied with every other. The old Confederation was therefore not similar in essence with the modern confederacies as they have arisen in America (1777–1789), in Switzerland (1815–1848), and in Germany (1815–1866). Yet, on the other hand, there existed an organic connection between these different federal leagues, first, because in substance they materially agreed and because in the course of time common institutions were created, which were considered as representative of the commonalty and which proceeded as such towards foreign lands, according to international law.

These leagues aimed above all, just as the first one of 1291, at establishing defensive alliances. A broader, more general, and original aim was also that of fortifying the internal legal order, namely, the security of the ways of traffic. The so-called "Pfaffenbrief" (priest charter) of 1370 was also a state treaty, which established the principle of *forum domicilii* (court of the domicile), limited the jurisdiction of the church, forbade arbitrary seizure, and other things besides. Another treaty, the so-called "Sempacher Brief" (Sem-

pach charter), even stipulated norms as to martial law, and was probably the first state treaty relating to the humanization of war. The "Orte" of the old Confederation had the right to conclude treaties as well with each other as with foreign nations, especially since in 1499 they became independent — that is, sovereign in fact, and in 1648 through the Peace of Westphalia became so in form. As the leagues were perpetual ones, the pledges which they assumed took precedence over later treaties, but the "Orte" had in an authorized manner the right of free, international, and interstate concluding of treaties, except the five states which had last joined the league and only had a limited right of concluding treaties.

As the Confederation has arisen from leagues and was not created as an organization, what it naturally first felt the need of was organs. Even in the beginning the individual leagues provided that the deputies of the allied communities must meet in common councils, but that varied in every league according to the contracting parties. It was only gradually that there was formed through custom from these separate meetings a unitary "Tagsatzung" (Diet), which met regularly at a fixed place. This development was mainly necessitated by the fact that a great many of the "Orte" had made common conquests and governed in common over these conquered territories.

As a rule, it was only the "Orte" which took part in the Diets; the allied states only sent delegates upon special request. The Diets had, on the whole, the character of a congress of envoys. They had no specified power, like a modern federal parliament, but dealt with everything about which the governments of the confederate states gave instructions. Resolutions could not be taken by majority, excepting where the leagues made such a provision for special cases. Moreover, every state could refuse to join in the treaties concluded by the Diet with foreign nations. On the contrary, however, the states could make contracts with each other at the Diet.

Aside from the Diet there was another permanent organ, the "Vorort" (presidential state). This institution was based entirely upon custom. Zurich obtained this position; its delegates presided at the Diet and when the Diet was not in session its government looked after the current affairs, namely, the diplomatic intercourse. It had, however, no exclusive right to do the latter.

One of the weightiest limitations which the leagues imposed upon the sovereignty of the states was the interdiction of self-aid, of war with each other. The subsequent leagues also stipulated, as that of 1291 had done, the principle of obligatory mediation and arbitration. When differences broke out between the states the mediation or arbitral procedure had to be called upon, in so far as a party required it. The stipulations in the individual treaties differed; however, a sort of confederative unwritten law was formed. Each party designated its own arbitrators, who when unable to reach an amicable understanding elected a neutral umpire from some one of the states. Such resolutions have repeatedly been passed and only recently the Federal Court had recourse to such a sentence in an intercantonal process, as to a decision of actual legal authority. Obligatory arbitral procedure has not, however, saved Switzerland from civil wars, but it has undoubtedly rendered great service to the Confederation. The greatest internal war of Switzerland — the so-called Zurich war (1436–1450) — was precisely an execution war against Zurich, which did not want to accept the arbitral procedure.

As a result of the Revolution and French intervention of the year 1798, which brought about the founding of the democratic Helvetic unitary State and the elimination, on principle, of all feudal elements in the organization of the State, all interstate law came to an end. The states which up to that time had been sovereign states now sank to mere administrative districts deprived of all autonomy, when they were not wholly suppressed and consolidated with other Cantons into new districts.

This complete break with the past must soon call for a reaction. The Helvetic Republic never reached a tranquil development. In the numerous new projects for a constitution, which originated at the time, the attempt was made to call into existence both a central and local organization for the administration. Here it must be remarked that then for the first time in Switzerland, and probably for the first time in all Europe, the Constitution of the United States was held up as a model to be copied for a state to be organized on a federative basis.

The external and internal troubles of the "Helvetik" (as the

period from 1798 to 1803 is called) came to an end when Bonaparte, in the autocratically assumed rôle of mediator of Switzerland, imposed the Mediation Constitution of February 19, 1803. Hereby the nineteen Cantons having equal rights were recognized as states and to each was given its own constitution and all the powers which were not expressly ascribed to the Confederation. Switzerland was given the character of a federal state, albeit of a weak one, such as then suited the needs of French politics. The organization of the confederation was based upon that of the old Confederacy. The highest organ was the "Tagsatzung" (Diet), in which a number of larger Cantons had two votes; the others only one. The envoys voted according to instructions. The official business was dispatched by the directorial Canton, for which position six Cantons changed off in yearly terms. The president of the directorial Canton had the title of "Landammann der Schweiz" and was invested with no little authority.

The Cantons could not have any diplomatic intercourse with foreign nations and could only enter into contracts by special permit from the Diet. They were not allowed to form any special alliances with each other and the Constitution did not make any mention of nonpolitical contracts of the Cantons with each other. The Diet, however, by a decree of June 29, 1803, recognized the power of the Cantons to make contracts among themselves relating to church, civil, police, and local matters, in so far as they brought these agreements to the knowledge of the Diet, so that the latter could examine them as to their accordance with the Federal Constitution. These contracts were considered as a particular kind of international contract and were judged according to the principles of international law.

Aside from these particular intercantonal contracts there was still another special kind of intercantonal agreements which was intermediary between the Federal laws and the aforementioned contracts. The Constitution had given to the Confederation only a rather limited competence and a revision of the Constitution was not provided for. The powers of the Federal Government could therefore not be increased through decisions by majority. That, however, did not prevent matters from being dealt with at the Diet which did not,

according to the Constitution, come under the jurisdiction of the Confederation, but for which a uniform order was sought.

When the Diet came to a decision upon such matters there arose, when there was a majority or unanimity, a Federal concordat [3] which was, however, only binding for the agreeing Cantons. The decisions by majority, on the contrary, which the Diet made within its constitutional competency were of course binding for all Cantons. These Federal concordats were considered, as were the actual decisions of the Diet, parts of the Federal law; they originated outwardly in the same way as the Federal laws, but they had binding force as state treaties only for the Cantons which accepted them or later adhered to them. In this manner many matters have been uniformly settled for a large number of Cantons. Of these Federal concordats, some are still in force to-day, while others have been abrogated and replaced by Federal laws.

When disputes arose between the Cantons the Federal authorities had first to endeavor to bring about a mediation. Failing this the dispute was then decided, as a last resort, by the Diet. The latter, for this purpose, constituted itself into a syndicate (federal court of justice) in which all Cantons had only one vote and their envoys could vote, not as in other matters according to the instructions of their directors, but freely as judges. In case the Diet was not in session the " Landammann " (President) had authority to introduce mediation.

[3] The expression " concordat " for intercantonal contracts seems to come from the fact that the first contract made between two Cantons, after the reestablishment of the cantonal personality of statehood under the Mediation of 1803, dealt with matters relating to the church. As the treaties between civil governments and the Roman curia (papal court) had been designated as concordats ever since the Middle Ages, it seems that these intercantonal agreements had also been given the name concordat. The name was then applied also in other cases which had nothing to do with church matters.

However, it does not follow that all intercantonal agreements were called concordats. The terminology has unhappily never been strictly adhered to, but it can be said that as a rule only those treaties were called concordats which established legal norms and did not deal with mere concrete relations. About the different meanings of the " eidgenössische Kankordate " (Federal concordats) before and after the introduction of the Federal Constitution of 1848, as opposed to the special concordats, it will be discussed farther on.

With the downfall of Napoleon, his work, the Mediation Constitution, also fell. In the years 1813 to 1815 a unitary organization was totally lacking in Switzerland, as the Mediation Constitution was formally abolished; the negotiations regarding the conclusion of a new Federal treaty advanced but slowly in some of the Cantons, owing to separatistic efforts. Finally, in September, 1814, the establishing of a new constitution was reached. On the 7th of August, 1815, the oath was solemnly taken to the new Confederation, to which, in the meantime, in consequence of the new disposition of the European relations through the Vienna Congress, three other Cantons had joined. By that the Confederation reached the number of twenty-two Cantons, which it still has to-day.

The League of 1815 was a confederacy, viz, a union of states, whose organization was based exclusively upon the allied states and whose constitution rested upon the principle of agreement — that is, it could only be changed by unanimous consent. But it is not correct with the prevailing theory to perceive in these confederacies merely international law relations of partnership. A federal government, even though weak and incapable of development, was attained through the Federal League, and the sovereignty — viz, the complete independence — of the allied states had ceased to exist. The League was perpetual and therefore irredeemable. With regard to the secession of 1847, Federal execution was provided, but not war of an international character waged.

But it is unquestionably true, on the other hand, that the twenty-two Cantons of the Confederation still continued to exist as states; they styled themselves therefore "sovereign," as in the present Federal Constitution, though they were no longer sovereign, *i. e.*, wholly independent. Their personality in international intercourse was not suppressed. They could conclude treaties about matters of state economy and public administration, as well as military capitulations, by means of which the enlisting of Swiss soldiers was permitted to foreign governments. These agreements must be brought to the knowledge of the Diet and must contain nothing contrary to the Federal treaty or to the rights of other Cantons. Declarations of war and conclusions of alliances and commercial treaties were exclusively

the affair of the Diet as the representative of the entire Confederation. Diplomatic intercourse also belonged to the Confederation; still, it was not forbidden to the Cantons to negotiate with a foreign country regarding matters within their competency.

The right which Cantons had of concluding treaties with each other was limited only by the principle that these agreements between the Cantons should not be opposed either to the Federal agreement nor to the rights of a third Canton. The concordats and agreements concluded under the Mediation Constitution were ratified by the new Federal agreement as far as they were capable of being united with the latter. The Federal concordats were, however, revised by the Diet after 1815 simultaneously with the actual decrees of the old Diet, but in substance they were ratified. Since the competency of the League of 1815 was more restricted than that given by the Mediation Constitution, some of already existing Federal laws were changed into mere concordats.

As already under the Mediation, there were besides the real intercantonal agreements Federal concordats which were intermediary between contract and law; thus Federal law has in this way become further developed under the Federal treaty of 1815. As the Federal treaty could not be revised by a majority of votes, and as the competency given to the Diet by it was insufficient, the Diet had to be satisfied to consider the decrees made by it outside of its actual jurisdiction as Federal concordats and therefore only binding for the consenting Cantons. In so far the condition was the same as under the Mediation. On the other hand, this peculiar institution of Federal concordats was further developed, in a peculiar way, by a decree of the Diet of July 25, 1836. While it was undisputed that the agreements of the Cantons concluded outside of the Diet were to be judged among themselves entirely according to international law, even in reference to giving notice, still it was different with the Federal concordats, which although not universally binding, yet constituted a part of the Federal law. The decree of 1836 acted as intermediary between the fixed irredeemability of the Federal laws and the free redeemability of undelayed agreements. According to this no Canton that had agreed to a concordat concluded by a majority of all the Cantons at the Diet could withdraw from it without having received

the consent of the majority of the Cantons subscribing to the concordat in question. The withdrawal being granted by the majority of the contracting parties, it was also necessary to determine whether the concordat should endure for the remainder. In case the withdrawal was refused, the Canton had the right of appeal to the Diet and the latter had power of itself to permit the withdrawal. But the Canton released in this way from the concordat was bound to give an indemnity to its former joint contractors, within the measure that could be determined according to the nature of the matter.

When the number of the contracting parties was diminished by withdrawals to eleven — that is, to less than the majority of the Cantons — then the agreement lost the character of a Federal concordat.

With regard to disputes of Cantons with each other, all measures of self-aid were prohibited to the Cantons, just as it should be in every confederacy. They had to submit themselves, just as was the case before 1798, to the so-called " Eidgenössisches Recht " (Federal mediation and arbitration). The Federal treaty designated as coming under Federal mediation and arbitration all disputes not relating to the rights guaranteed by the Federal treaty. About this decision a dispute arose in which the representatives of the national idea represented the right conception, that in these very weighty questions (integrity of cantonal property, freedom of trade among cantons, etc.) the Diet, as the highest organ of the league, was competent, whilst the partisans of cantonal sovereignty interpreted that decision with restrictions and accepted no obligatory Federal tribunal when the latter was not expressly stipulated by the Federal treaty.

Private legal disputes between Cantons were also to be decided by Federal mediation and arbitration, as no Canton, on account of its sovereignty, could be compelled to accept a sentence before the jurisdiction of another Canton.

The mediation and arbitration proceedings were as follows: Each of the contending Cantons was to designate two judges from the magistrates of other Cantons.

In the first place, these judges were to try to bring about friendly mediation. If they did not succeed in bringing about an understanding, they then elected from among the high Swiss magistrates

one as president who neither belonged to a party nor to the states of which any of the judges designated by the contending Cantons was a citizen.

In case of necessity the president was elected by the Diet. The court thus formed had to try to bring about a second mediation or so make itself a binding agreement when all parties were ready to vest it with such powers. If both forms of the mediation failed, the arbitrators decided in first and last instance according to law. The Diet executed the award if it was not freely executed by the defeated party.

The organization of the Confederation from 1815 to 1848 had a decidedly federative character. The highest organ was the "Tagsatzung" (Diet), in which all the twenty-two Cantons were represented by deputies. All Cantons, whether large or small, had one vote, but the half Cantons (which had been formed by division) had only one vote which they could exercise only in common. The deputies were instructed by the governments and the Diet was not considered as a parliament. Besides the Diet there existed a "Vorort" (presidential state), which changed about every two years between the Cantons Zurich, Berne, and Lucerne and exercised the same administrative and business functions as before 1798. In addition to the keeper of the record and certain military organizations there were no federal organizations which were not primarily cantonal. The Confederacy, except in individual military matters, was lacking in all direct authority. The powers of the Federal Government were exercised, not directly by the Confederacy itself, but through the Cantons.

III. INTERCANTONAL LAW UNDER THE PRESENT FEDERAL CONSTITUTION [4]

1. The legal status of cantons

The Cantons are to be considered as states in their relations to the Confederation, to foreign nations, and among each other. Though in all federal states the federal government be superordinate and the

[4] Modern intercantonal law has been fully and very ably treated by Arnold Bolle, "Das interkantonale Recht," La Chaux-de-Fonds, 1907. This work is the only comprehensive and systematical description of the subject. Special ques-

member states may be deprived of their statehood in numerous and important matters of public administration, the fundamental relations between Confederation and Cantons are of contractual nature, *i. e.*, they can not be changed but by mutual understanding. Thus, article 5 of the Federal Constitution, which guarantees to the Cantons their territory and sovereignty, is not, as other parts of the Constitution, subject to constitutional revision, unless the Cantons concerned agree. It is the same about the principle of equality of the Cantons. If unlimited powers of constitutional revision ("Kompetenz-Kompetenz") were vested in the Federal Government, no logical difference between a federal and a unitary state could be established. However, it must be said that the rights of member states within the Federal Constitution, beside the fundamental rights of statehood and equality, are presumed to depend on Federal constitutional law.

The legal personality of the Cantons in international law has not been taken away by the Federal Constitution. The Cantons can acquire rights and duties by treaties with foreign nations about specified matters, viz, administration of public property and border and police intercourse. Such treaties are to be negotiated by the Federal Council, because the Cantons are not authorized to have immediate official intercourse with foreign governments, except purely administrative relations to inferior officers of other states.

The statehood of Cantons in their mutual relations is determined by the contitutional limitations upon cantonal powers. As far as cantonal law has not been superseded by Federal law, the Cantons have retained the status of states both in relation to the people residing on their territory and towards each other. Therefore, the Cantons exercise the powers left to them in full independence, limited only by the rules of federal interstate law. Thus, the Cantons are above all authorized to make laws and provisions about all matters within their powers. It is a question of interpretation whether in matters ruled by Federal law the latter excludes implicitly cantonal legislation in cases not expressly settled by Federal law.

tions, as, *e. g.*, on settlement, extradition, etc., have been treated in monographs. For further information consult the two leading commentaries on the Federal Constitution by Burckhardt and Schollenberger.

The Cantons exercise their powers autonomously not only as to their interior organization, but also as to interstate relations. In this respect, however, they are bound by article 60 of the Federal Constitution, which reads as follows:

> All Cantons are bound to treat the citizens of the other confederated states like those of their own state in legislation and judicial proceedings.

But this reciprocity clause does not exclude a different treatment of persons residing in one Canton and those living in another.

Beside the autonomous regulation of matters of intercantonal importance, the Cantons have the power to conclude treaties among each other concerning such subjects. The treaty-making power of the Cantons is not identical with their legislative and administrative power, which covers a larger field of action. Article 7 of the Federal Constitution recognizes the right of the Cantons to make conventions among themselves upon legislative, administrative, or judicial subjects, *i. e.*, upon all subjects of activity of a state. This general permission, however, is limited by a restriction of general character — all separate alliances and all treaties of a political character are forbidden. Though the Cantons may pursue a policy of their own as separate commonwealths, they may not combine to common political action by treaties.

While the *jus foederis*, albeit restricted, is recognized, the Constitution seems to exclude an interstate *jus legationis*, because diplomatic intercourse among Cantons is superfluous for ordinary transactions, and political cooperation of Cantons is formally forbidden. It is a question of little importance, and not yet decided by the Federal authorities, whether official delegates of a Canton enjoy on the territory of another Canton the privileges of exterritoriality.

One of the most important restrictions laid upon state powers is the formal and total exclusion of all means of self-aid. Though military legislation is within the exclusive power of the Confederation, the Constitution itself guarantees to the Cantons to a certain degree military self-administration and the right of disposing of the troops recruited in their territory, but only for maintaining interior order — never for violence against other Cantons or foreign nations.

The interdiction of self-aid does not relate only to war, but to all kinds of self-aid, as retorsion, differential treatment, seizure, ect. All intercantonal differences must be settled amicably, *i. e.*, by negotiations between the Cantons concerned or by arbitration or by the Federal Court.

2. Cantonal territory

The Federal Constitution guarantees to the Cantons their territories, but makes no other provisions relating to this subject. Therefore, the territorial relations of Cantons with each other are ruled by common international law or by interstate treaties. Rivers forming the boundary between two Cantons are, according to a recent decision of the Federal Court, divided by the middle line, not by the thalweg, because the Swiss rivers are generally not navigable. Navigation, however, will become important in Switzerland and the Federal Assembly has voted this year a bill for a constitutional amendment conferring powers on the Confederation to make regulations on the exploitation of water powers and on navigation.

The intercantonal boundaries, as far as they are not geometrically fixed, can be changed by natural processes. If in such cases international law is to be interpreted by analogy to private law, it must be presumed that Swiss private law, as embodied in the new Federal civil code, is applicable.

If cession of territory from one Canton to another is to be effected, such cession has to take the form of an intercantonal treaty and must therefore be brought to the attention of the Federal Council. If the cessions have not the character of subordinate boundary regulations, but relate to a considerable territory, such treaties are certainly to be classed as political treaties, which are forbidden. However, such a cession might be in certain cases in the interest both of the Cantons concerned and the Confederation itself. In a case of this kind the Federal Assembly as presumptive possessor of all Federal powers would certainly be entitled to make such treaties lawful. But in no event intercantonal cession necessitates a revision of the Constitution, as some writers suppose. The Constitution enumerates the Cantons forming the Confederation, but only as political entities,

which remain the same as long as the same political organization continues to exist on a part of the territory. Only in the case of the creation of new Cantons by way of fusion or dismembration constitutional revision would be necessary.

The territorial rights of the Cantons can under the Federal Constitution be modified, beside the unimportant case of physical changes, only by treaties and not, as in international law, by prescription, *i. e.*, undisputed possession. Thus, the Federal Court held that the Canton of Zurich, which during more than half a century exercised sovereignty over the southern half of the Rhine at Schaffhausen, could not acquire legally that river territory because the Canton of Schaffhausen had never consented through its constitutional organs to an abandonment of its exceptional rights on the whole river. The court did not give arguments for its opinion, which is, however, justified because the Federal Constitution guarantees the powers vested by the cantonal constitutions in the state authorities.

The constitutional guaranty of state territory by the Confederation does not only protect the Cantons against attacks, it forbids every Canton to interfere with the *status quo* of another Canton.[5] The interstate rules of vicinage are the same as those of international law, *e. g.*, if a river flows through two Cantons, the upper Canton is obliged to secure to the lower one the natural flow of the water, but according to private law it is authorized to accumulate the water during the usual hours of rest of work. The pending constitutional amendment will give to the Confederation the necessary power of making provisions for the exploitation of intercantonal rivers. Since in all the most important water powers of Switzerland more than one Canton is interested, and this source of energy is a most valuable equivalent for coal, which must all be imported, the question of intercantonal rivers is one of great national concern and can not be longer left to interstate negotiations and quarrels.

So-called interstate servitudes are rare, but they exist and are recognized by the Federal authorities. By treaty one Canton can grant to another the exercise of territorial rights, *e. g.*, the prerogative

[5] American Journal of International Law, Vol. I, pages 245–249.

of conceding the right of fishing, or the incorporation of a township in the school or church system of another Canton.

If intercantonal cessions of territory take place, the rules of succession of states are applied in the same way as in international law. The rights acquired under the former rule must be recognized by the new sovereign as if they were acquired under his own law.[6]

3. Intercantonal treaties

The power of Cantons of concluding treaties is determined positively by the recognition of interstate treaties on legislative, administrative, and judicial matters and negatively by the prohibition of particular leagues and political treaties in general and by the condition that treaties on lawful subjects contain nothing contrary to the Confederation and to the rights of other Cantons. While this condition is clear and flows necessarily from the preeminence of Federal and interstate law over cantonal law, the two other prescriptions need some explanation. The notion of a political treaty is not defined by the Constitution and it is indeed impossible to do it. It may be said in general that an interstate treaty is political if it tends to strengthen the influence of one or more Cantons at the expense of others, either in state or in Federal politics, *e. g.*, it would be unlawful if Cantons of similar political tendencies would combine for joint exercise of their powers relating to Federal legislation. There are conventions which in some cases may be purely businesslike, whilst under certain circumstances they might be irreconciliable with Federal interests, *e. g.*, conventions concerning the construction of railways. Since the establishment of the Federal State in 1848 the question of political treaties has fortunately ceased to be a matter of actual Swiss politics, but in the stormy period of the liberal reforms in the thirties alliances of liberal Cantons on one side and of conservative and Catholic Cantons on the other played a great and dangerous rôle in Swiss politics.

The enumeration of lawful treaties, viz, treaties on legislative, administrative, and judicial matters, does not relate to special sub-

[6] AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. I, pages 237–245.

jects, but seems to cover the cantonal powers in all possible forms. Legislation in contradistinction to administration and justice can not mean legislation as constitutional expression of the supreme will of the state, but is identical with regulations, *i. e.*, promulgation of abstract rules to be applied uniformly in the contracting Cantons, *e. g.*, the concordat on the cattle trade is an example of a purely legislative convention, because it provides uniform private law on a special subject.

The existing interstate treaties are to be divided in two classes, viz, (*a*) Federal concordats and (*b*) particular concordats, and other interstate conventions. Federal concordats as they existed under the Mediation Constitution and the Federal treaty of 1815 and formed an intermediary form of intercantonal and Federal law can not be concluded since 1848, because the old Diet has been abolished, but the concordats existing in 1848 have been recognized by the Federal Constitution and exist to this day, though some embrace now only a minority of Cantons. Under the present Constitution those interstate conventions are called Federal concordats which either go back to the Federal concordats of the Mediation and the Confederacy or have been concluded since by a majority of Cantons or are at least of interest for and open to Cantons other than the original signataries. All other intercantonal conventions are particular concordats or ordinary conventions. Though the distinction between the two classes of intercantonal agreements is not very sharp, the Federal concordats are in one respect differently treated, inasmuch as the Federal Council has to watch *ex officio,* not only as in other concordats at the request of the parties, over the observation of Federal concordats.

The Federal Constitution does not only place limitations of material character on the treaty-making power of the Cantons, but it contains also prescriptions of formal nature. The contracting Cantons are bound to submit all conventions concluded among themselves to the Federal authorities, viz, the Federal Council, which is authorized to prevent the execution of unlawful treaties. This prescription is purely formal. Though the Federal Court refused once to apply a convention not submitted to the Federal Council, an intercantonal

treaty is nevertheless executory according to the prevailing opinion as soon as it is ratified by the cantonal authorities in which the treaty-making power is vested, even if the Cantons have not brought it to the attention of the Federal Council. If, on the contrary, the constitutional prescription has been observed and the interstate convention has been approved by the Federal Council this approbation has not the character of a final sanction. If later on either the Federal Council or the Federal Court have to secure the execution of the convention, they are authorized to examine again its lawfulness.

Interstate treaties may conflict with Federal law or with the rights of other Cantons or with rights and interests of the Confederation. In the first case they are, so far, nul and void; in the two other cases the Federal Council has power to prohibit their execution. If the Federal Council refuses to recognize such a convention, or if other Cantons protest against it, the convention is to be brought before the Federal Assembly, which examines *ex officio* the lawfulness of the assailed treaty and pronounces either approbation or prohibition. But even in this case the Federal Assembly can come back on its decision and the Federal Court is not bound by such an approbation of the Federal Parliament.

If Federal law is changed, either by ordinary legislation or by constitutional revision, interstate treaties become *ipso facto* nul and void as far as they conflict with the new Federal law.

If two Cantons settle matters of common interest, not by formal treaties, but only in the way of a *modus vivendi* by which no party is legally bound, the approval of Federal authorities is not necessary. However, the Federal Council, which has to watch over Federal law, could intervene and Cantons injured in their rights might lodge a complaint with the Federal Court against an unlawful practice of other Cantons.

If intercantonal treaties are not unlawful, they are not only allowed, but effectively protected by Federal law, even if they have not been submitted in due time to approval. In the case of Federal concordats the Federal Council has to watch *ex officio* over their execution, at least as far as public interests are engaged. As regards particular concordats and other interstate conventions the Federal

Council intervenes only at the request of a Canton and it is obliged to secure in such a case the execution of intercantonal treaties, even, if necessary, by force. In such case, however, the Canton which is in the rôle of the defendant will probably contest the legal point of view of the plaintiff, so that before a Federal decree of execution may be issued the Federal Court has to decide the case. If a Canton is reluctant to execute a sentence given against it, the Federal Council is bound to compel it.

But practically intercantonal disputes regarding conventions do not have the character of an actual conflict, but that of a legal dispute, which is settled by the Federal Court if the parties do not institute an arbitral tribunal for the case. Besides the provisions of the Federal Constitution for the judicial settlement of interstate differences which are treated below, the Constitution provides still another mean which secures indirectly but very effectually interstate treaties. Any private individual or corporation may lodge a complaint (petition of public law) with the Federal Court, if deemed to be injured by nonapplication or wrong application of any intercantonal agreement by cantonal officers. The subjective rights acquired through or under intercantonal treaties enjoy the same judicial protection as the rights granted by the Federal or cantonal constitutions or by international treaties. This jurisdiction of the Federal Court relates only to questions of public law, so that cases in which cantonal courts apply private law established by concordats can not be brought before the Federal Court as petitions of public law, but only as ordinary complaints, under the same circumstances under which an ordinary appeal lies from the cantonal civil courts to the Federal Court. It is the same with penal prescriptions of concordats.

The conclusion of intercantonal treaties is ruled by cantonal constitutional law. In all Cantons the executive power is authorized to negotiate with other cantonal governments, either at its own initiative or at the request of the Parliament. In some cases of Federal concern, if Federal legislation seemed to be impracticable for the time the Cantons negotiated concordats at the invitation of the Federal Council and under the presidency of a Federal councilor; thus, recently the concordat concluded in order to adapt interstate law to

international law concerning the *cautio judicatum solvi* (convention of The Hague) and the concordat on automobile traffic. By the Federal law on fishing the Cantons are even bound to make conventions for regulating the fisheries in intercantonal waters.

Before the ratification, as an act of interstate intercourse, can take place, *i. e.*, before the covenanting Cantons declare to each other to be bound by the agreement they have negotiated and signed by the cantonal executive authorities, the latter have to obtain the approbation of the cantonal legislative assembly and in many Cantons besides that the sanction of the people. In some Cantons the constitution prescribes expressly that all interstate conventions, or at least the most important classes of them, have to pass the plebiscite in the same way as ordinary legislative acts (obligatory referendum), or the popular vote is to be taken because all decrees of the parliament, and therefore also the decree of ratification of an interstate agreement, are subject to the final sanction of the voters. In other Cantons there exists only a facultative referendum (*i. e.*, depending on being requested by a certain number of citizens) or the conclusion of interstate conventions is vested exclusively in the legislative power. In practice the cantonal executive officers are generally competent to make agreements on minor matters or without legal force (*modus vivendi*), especially reciprocity declarations.

The extinction of intercantonal treaties as consequence of their becoming impossible or by *mutuus dissensus* of the parties or other causes general to all contracts does not differ from that of international treaties. Regarding denunciation of intercantonal conventions there is, according to the opinion of the Federal Court, to be made the same distinction as in international law, viz, between conventions having a concrete object (*e. g.*, territory, servitude, financial guaranty, etc.) and concordats establishing for the parties common rules of law (concordats). In the first case denunciation is excluded, unless the maintenance of the treaty becomes for one of the parties irreconcilable with its existence as an independent community or unless circumstances have changed to a degree that the *raison d'être* of the treaty has ceased to exist. The theory of the *clausula rebus sich stantibus* has been recognized by the Federal

Court as applicable to interstate agreements. In the case of concordats we must distinguish between Federal concordats anterior to the year 1848 and other conventions of this character. The former are still to-day subject to the special system of denunciation established in 1836; the latter, on the contrary, can be denounced freely at any time, in the case of modern Federal concordats, by simply giving notice to the Federal Council.

As for the abolition of interstate treaties by Federal law and Federal authorities the reader may be referred to that which has been said above.

4. The pacific settlement of intercantonal differences

It has already been stated that self-aid of all kinds is banished from interstate relations. The settlement of disagreements and disputes is left in the first line to interstate negotiations, but there is no constitutional prohibition against Federal good offices and mediation being requested or offered. If an amicable understanding can not be arrived at, the Cantons, if they do not drop the question, are compelled to have recourse to judicial proceedings. Two possibilities are offered to them — arbitration and process before the Federal Court. The first eventuality is of no practical importance and never resorted to, but the Constitution formally empowers and obliges the Federal Council to execute arbitral sentences in intercantonal disputes. The normal way of settling intercantonal disputes is by petition to the Federal Court. This supreme tribunal of Switzerland, which has its seat not as the Federal Council and Assembly in Berne but in Lausanne, is composed of sixteen judges and nine deputy judges. No special provision is made for the representation of the states, only by the act of organization of Federal justice it has been made a duty of the Federal Assembly, which elects the judges, to provide for a representation of the three national languages. The judges who are citizens of a Canton being a party in a trial can not sit in the court for that case. The judges enjoy on the territory of the Canton where they exercise their functions the same immunities which are accorded to the Federal Council. Before the constitutional revision of 1874 the Federal

Court was not a really permanent tribunal, but was convoked only as far as business was pendent and the judges were not professional officers of the Confederation. Since 1874 the Federal Court is a fully equipped and standing court; the judges are excluded from other official functions and from business. The court is divided into several senates and sections, the most important of which are the section for civil cases and the section of cases in public law.

The jurisdiction of the Federal Court over intercantonal disputes is of a double nature — disputes in civil law and disputes in public law. The practical difference between the two classes of lawsuits is, in the case of Cantons, of minor importance, because in both events the Federal Court acts as court of first and last instance. For private persons and corporations, however, the possibility of appeal in private and public law is fundamentally different.

A civil suit between two Cantons is a dispute on rights of private character such as a private person might possess. Not all disputes of a financial nature are civil, *e. g.*, a process on the collection of taxes is a question of public law. The jurisdiction of the Federal Court over civil cases is established in conformity with international law, according to which no sovereign is bound to recognize the jurisdiction of another except in cases of property. The Federal Court, however, is always competent. The Constitution mentions among the civil cases to be submitted to the Federal Court disputes between communes of different Cantons concerning the citizenship of individuals. It is possible that the Cantons act instead of the communes and this jurisdiction ought logically to be placed under the competency of the section for public law. Interstate disputes on the "Heimathlosat" (people having no allegiance) — a matter formerly regulated by a concordat — are decided in the same way by the Federal Court.

Interstate disputes in public law are those in which the Cantons appear not only as parties but in their peculiar quality as political entities. The law on the organization of Federal justice mentions especially as interstate disputes those on boundaries, powers of the authorities of different Cantons, interpretations and application of interstate treaties, etc. In some matters which are of less judicial

but rather administrative character and which are in the main regulated by Federal law, the Federal Council instead of the court is authorized to settle interstate disputes (fisheries in intercantonal waters, police over rivers and torrents in the Alps, police of forests, etc.). But the presumption always militates in favor of the jurisdiction of the Federal Court.

There can be a connexity of interstate disputes and conflicts between a private individual or corporation and a Canton foreign to them, *e. g.*, if in one Canton the water is diverted to the detriment of a mill in another Canton or if the property of one territory is endangered or deteriorated by constructions or exploitations made in another Canton. In such cases the private plaintiff has no independent right of action against the Canton from the territory of which he is injured; the Canton alone to which the plaintiff belongs is entitled to appeal to the Federal Court in cases relating to non-conventional interstate law. The different situation in the case of violation of an intercantonal treaty has already been treated above. But if the dispute of the private plaintiff has — as it would have in the cases cited above — the character of a civil process, the plaintiff might go before the Federal Court directly, because this tribunal has original jurisdiction in all cases between a Canton and any private individual or corporation, if one party requires it and the contested value amounts to at least 3,000 francs. This provision of the Federal Constitution makes superfluous a right of Cantons to intervene in favor of their citizens if those are engaged in disputes with other Cantons. If a Canton is neither interested as to its private rights nor as to its public powers, it is excluded from intervention in interstate disputes of the inhabitants of its territory or its citizens. These are fully protected by Federal jurisdiction, both in matters of private and public character.

The law applied to interstate disputes by the Federal Court is in civil cases that private law, federal or cantonal, which in analogous cases between private parties would be applied according to the principles of intercantonal private law. In cases of public law Federal law takes precedence over all other legal prescriptions which might be in question. In second line conventional interstate law

peculiar to the parties will be applied and as subsidiary rule common intercantonal and in last resort international law.

Disputes between Cantons are not necessarily of a legal character. Interests not protected by law, and therefore not recoverable before a court, may be of no less importance than subjective right, and if menaced or injured by another Canton may cause serious difficulties. In such cases intervention would be justified according to the current doctrine of international law, but is impossible in the relations between Cantons. There may be other cases in which, though they can be decided according to law, such a decision, albeit unassailable from a legal point of view, may be most unsatisfactory from the standpoint of equity and national politics. As the Cantons are strictly forbidden to have recourse to self-aid and can not, as sovereign nations can do, refuse to accept judicial proceedings in cases where vital interests are engaged, another mean must be provided for such conflicts. It consists in the intervention of the Federal Assembly. Though the Constitution does not give to the Confederation special powers of this kind, the power to make the necessary provisions for keeping order and especially interstate peace belongs to the absolute implied powers of every compound state. It is impossible to suppose that the Constitution, by the prohibition of self-aid, would bring an interstate dispute simply to a deadlock or have it judged according to rules evidently not suiting the case. In this way the Federal Assembly intervened in 1884 at the request of the Canton of Zurich, when the Canton of Argovie refused to secure the payment of debts which some of its cities had guaranteed collectively with communes of the Canton of Zurich, while these latter had already been compelled to pay their share. The Confederation made an arrangement in making a favorable loan to the Cantons concerned prescribing the conditions of the payment and redemption of the debts.

If in spite of all constitutional provisions violence between Cantons is threatening or even breaks out, the Cantons concerned are obliged to give immediate notice to the Federal Council or in extreme cases are authorized to ask the aid of other Cantons. This latter provision, however, is obsolete. Though the Constitution

does not mention it, it is evident that in cases of interstate conflicts the Federal Council must intervene *ex officio*. The executive has, however, only limited power to settle the dispute. If armed intervention is necessary, the Federal Assembly is to be summoned, at least if more than 2,000 men are mobilized or the troops remain more than three weeks in active service.

5. *Matters of interstate concern*

Matters of interstate concern are matters which are ruled either by interstate law, Federal and intercantonal, or by pure Federal law, but having materially though not formally interstate character. To the first class of legal relations those belong in which Cantons are treated or recognized by Federal law as states, *i. e.*, as essentially independent and coordinate commonwealths in their mutual relations; to the second class those provisions of Federal law pertain which establish uniform rules without reference to interstate relations, but relating to subjects in which a different treatment, by the Cantons, of citizens and noncitizens might be supposed. Thus, the right of taking a domicile anywhere, the liberty of trade and industry, etc., are guaranteed not only for intercantonal relations, but generally, viz., also for intercommunal relations. But if we look at these provisions of the Federal Constitution from the point of view of historical development, it is evident that Federal law points above all at an equal treatment of all Swiss citizens inside and outside their native Cantons.

In the following notes no thorough and complete investigation into the Federal law relating to interstate relations nor into the autonomous or conventional practice of Cantons is aimed at, but only a general survey of the most important matters of interstate concern.

a. Nationality. — Federal law regulates only the naturalization of foreigners, *i. e.*, it prescribes the conditions in which Cantons can naturalize aliens and in which they must recognize anew citizens who have lost personally or through their parents a former allegiance with a Swiss Canton. Besides that the Cantons are competent to regulate at liberty naturalization both of foreigners and of citizens of other Cantons. One important restriction is

laid upon Cantonal legislation — no Canton is allowed to expel from its territory one of its citizens or deprive him of his right of citizenship. If there are people belonging to no Canton the Federal authorities decide definitely which Canton has to recognize them as citizens. Cases of double allegiance to two Cantons are of no legal interest except in questions of intercantonal private law. Conflicts, unavoidable with international *sujets mixtes,* do not exist in intercantonal relations, because the Cantons do not exercise rights over their citizens outside their own territory, and especially because military service is uniformly regulated for all Swiss. The question of cantonal citizenship is not of considerable importance in intercantonal relations, because the Federal Constitution guarantees to the citizens of one Canton domiciled on the territory of another Canton an almost perfectly equal treatment with the citizens of that Canton. The only matter in relation to citizenship which has been settled by a concordat is the "Heimatschein" (certificate of cantonal citizenship); this or an equivalent paper is sufficient for a Swiss to claim freedom of settlement in any place in Switzerland.

b. Different treatment in legislation of cantonal citizens and other Swiss citizens. — The Constitution forbids, in principle, all differential treatment, as has been stated above. However, such differences as are justified by the fact of residence and nonresidence are lawful. But all residents and all nonresidents are respectively to be treated equally; the fact of cantonal citizenship or of allegiance to another Canton is of no influence except in the cases reserved by the Federal Constitution. Some cases of differential treatment formerly general and only restricted by concordats have been explicitly prohibited by the Constitution, viz, the exit duty on property (*traite foraine*) translated from one Canton to another in consequence of emigration or succession, and the right of redemption (preemption) in favor of the citizens of the Canton where the property is situated. These relics of medieval law had already been abolished by interstate conventions since the beginning of the nineteenth century.

If in principle all Swiss are to be treated equally, the same law is not necessarily applied to all. The Constitution provided Federal legislation on the application of private law to persons residing out-

side their native Canton. In 1891 a law was enacted by which domicile is defined and stated in which cases the law of the Canton of origin or the law of the Canton of actual domicile must be applied. This legislation will lose most of its importance when, in 1912, the Federal civil code will be put into force.

c. Prohibition of double taxation. — The prescription concerning the equal treatment of all Swiss citizens excludes differential treatment in taxation, but does not make unlawful that the same value might be taxed twice under two different cantonal legislations. Such double imposition, however, is prohibited by the Constitution, which provides for Federal legislation on this subject. But the two Houses of the Federal Parliament never came to an understanding on the bills introduced. Nevertheless, the constitutional prohibition is applied by the Federal Court and the numberless and elaborate decisions of this court offer a complete system of law relating to double imposition and make a special enactment now superfluous. The prohibition relates only to intercantonal double imposition; not to international and intercommunal conflicts of taxation. These disputes are in principle classed as interstate disputes on public law; however, not the Cantons concerned, but the taxpayer appears in these cases as plaintiff before the Federal Court. Before 1874 the Constitution did not make any provisions about this matter; nevertheless the Federal Council (then competent) decided such cases because they were rightly considered as conflicts between the powers of the states. The prohibition relates only to direct taxation, not to police taxes, taxes on objects of luxury, stamp duties, etc. Taxes on personal property and income, including mortgages, are levied by the Canton of actual domicile; taxes on real property, by the Canton where the estates are situated; income from business, in the Canton where the concern is domiciled.

d. Right of settlement. — Citizenship in Switzerland differs considerably from the law of citizenship in most other countries. It is a cantonal institution, not a Federal one. The Swiss nationality is only a necessary consequence of cantonal citizenship, and this latter is subject to the acquisition of the hereditary membership in a commune of the Canton. This membership, which is acquired by birth

or admission, entitles to unconditional right to take domicile in the commune and to public aid in case of poverty, and in some places to considerable economic advantages derived from the common property of the community. In consequence of these circumstances there are in all communes three classes of inhabitants besides the foreigners — members of the community, other citizens of the Canton being members of other communities, and citizens of other Cantons. Only the first class is in possession of all possible rights: the second class is excluded only from the special rights connected with communal membership, because they enjoy these rights in the community where they are members. The third class can not claim more rights than the Federal Constitution prescribes as a minimum.

Every Swiss, whatever his citizenship may be, has the right to settle in any commune in Switzerland on the only condition of submitting a certificate of citizenship. Settlement can be refused or withdrawn from those who, in consequence of penal conviction, are deprived of their civil rights. Settlement may also be withdrawn (but not refused beforehand) from those who have been repeatedly punished for serious offenses or who permanently come upon the charge of public charity, if the commune or the Canton of origin refuse to grant sufficient relief to the Canton or commune of domicile. Expulsion on account of poverty by the commune of domicile must be approved by the cantonal government and notified to the government of the Canton to which the expelled pauper belongs. Special provisions are in favor of indigent persons who fall ill or die outside their Canton of origin. The constitutional prescriptions relate only to persons who have settled in a commune; not to temporary residents. As heretofore the two Houses of the Federal Assembly could not agree upon bills regulating this matter, the legislation on temporary residents is still within the powers of the Cantons, considerably limited indeed by the general prescriptions of the Constitution. There exist some concordats concerning the police of non-resident people.

The Cantons and communes of domicile can not require from the settlers securities or levy on them special or higher taxes than from their own citizens and members. Cantonal laws and regulations relating to settlement and the right of vote in communal affairs must

be submitted for approval to the Federal Council. The maximum of chancery taxes to be paid by the settlers is prescribed by Federal law.

Swiss citizens who have settled outside their Canton or commune of origin are admitted to the exercise of political rights on the following conditions, which represent the minimum of rights to be granted by the Cantons: In Federal elections and plebiscites the settler is entitled to vote as soon as he has submitted his certificate of origin. In cantonal and communal affairs he enjoys, after three months of residence, the same rights as the citizens of the Canton with the exception of participation in property of the community of communal citizens or other corporations and the right of vote in matters relating especially to the community of communal citizens (administration of the estates of the community, admission of new communal citizens, etc.).

e. Freedom of trade and industry. — The freedom of trade and industry, which is in close relation with the right of settlement, is guaranteed by the Federal Constitution without reference to interstate conditions. Among the restrictions to which this liberty is subjected there is one of intercantonal bearing. The Cantons may require proofs of competency from those who desire to exercise liberal professions. Federal legislation provided only for certain professions, such as physicians' and surgeons' uniform Federal examinations and certificates. In other professions the Cantons may make regulations as they think fit. It is recognized not to be contrary to the Constitution if for certain professions other than liberal certificates of competency are required, *e. g.*, for surveyors, midwives, etc. There exist some concordats and reciprocity agreements on such subjects. The concordat for the admission of reformed ministers in the state churches extends the liberty of exercising a profession to a class of state officers.

f. Civil justice. — Before civil law had been codified by Federal legislation the Cantons could agree upon uniform rules on private law. They did that only to a very limited extent. Intercantonal collisions of statutes, formerly the object of different concordats, are now settled by Federal legislation.

As for the law of procedure in civil cases the Federal Constitution

contains some very important provisions. Legislation on the organization of courts of justice and their procedure is, as far as Federal justice is not concerned, left to the Cantons. This power was expressly reserved when by the constitutional amendment of 1898 the Confederation was given the unrestricted power of legislation in civil and criminal law. The difficulties which might flow from the independence of Cantons as to courts and proceedings are in the main made impossible by two prescriptions of the Constitution — the principle of *forum domicilii* and the execution of all definitely pronounced civil judgments in each Canton.

The right of the solvent debtor, who has a domicile in Switzerland, of being sued for personal claims before the judge of his domicile is one of the most ancient rules of Swiss law and was recognized already in the league of 1291 and more distinctly in the interstate treaty of 1370 (priest charter). The *forum domicilii* is prescribed by Federal law only for personal claims relating to private law. For claims concerning real estate there is no Federal rule, but it is recognized that in such cases the judge of the *res sita* is competent. For cases concerning the personal status, family, and succession law the Federal law on the civil relations of people domiciled outside the Canton of origin has made no special provision.

In consequence of the principle of *forum domicilii* the property of a sued debtor situated outside the Canton of domicile can not be attached for personal claims. If the judge of the domicile has given his sentence, the sentence is to be executed also in any other Canton, but real estate creates no domicile for claims not relating to that estate. Seizure of property in order to secure the execution of legally pronounced sentences is regulated by the Federal law on bankruptcy and legal collection of debts.

The right of *forum domicilii* is of an exclusively intestate character and does not apply to the interior judicial organization of Cantons.

The second important prescription of the Constitution, which relates to civil proceedings, is as follows: Civil judgments definitely pronounced in any Canton may be executed anywhere in Switzerland. The rule covers only civil judgments — not those of a public character as, *f. i.*, decrees of taxation. The Constitution does

not forbid that the Cantons by agreements of reciprocity or concordats establish rules securing the execution of judgments on more favorable conditions and a more extensive basis. The Constitution prescribes only the minimum. Federal law does not regulate the form in which execution is requested and granted. For want of Federal and interstate conventional rules the general rules of international law are applied.

A concordat relating to civil proceedings has been recently concluded in order to exempt Swiss plaintiffs, having no domicile in the
vhere they sue the defendant, from being compelled to give
judicatum solvi, if such security is not required from the
s.

Criminal justice. — Extradition of fugitive criminals has always been granted between Swiss Cantons and formed a part of the common law of the old leagues. The Mediation Constitution pronounced formally the principle which was since 1809 developed in different concordats. The concordat of 1809 is still in force in a very limited degree. The Federal law on extradition, which was enacted in 1852 and revised in 1867 and 1872, has superseded almost entirely the law of the concordats. Federal law is incomplete and makes extradition obligatory only for enumerated cases. Extradition can not be made compulsory by Federal legislation for political crimes and crimes committed by means of the printing press.

A Canton is not obliged to deliver to another Canton its own inhabitants (not only citizens) on the condition of punishing them by its own courts.

The prescriptions of Federal law contain only the minimum; the Cantons are free to grant extradition also in other cases and so they do, mostly on the basis of reciprocity agreements. Therefore, the incompleteness of the Federal law does not cause serious disadvantages. By concordats extradition has been extended to police cases and even execution has been secured by a particular concordat.

The Federal law on extradition makes also provisions for the cooperation of the criminal authorities of different Cantons. They are obliged to make, at the request of officers of another Canton, investigations and hear witnesses.

Commissions of inquiry and extradition are to be effected without charge.

h. Various matters. — The above-mentioned matters are those which are of greatest interest not only in interstate but also in international relations. It would be almost impossible to state all cases in which interstate relations exist or at least are possible. Some matters of high importance in international law are on account of Federal institutions beyond the reach of interstate law — import and export, railways, telegraph. In other matters the space left to interstate law is narrow or large according to the extent of Federal powers and law. But even on subjects within the power of the Cantons these have in most cases made no regulations of an interstate character.

Concordats and other intercantonal treaties have been concluded on the following subjects, not mentioned above: Control of vagrant and other dangerous people, passports, transportation of surrendered criminals and of destitute people sent to the commune of origin, collections for pious and similar institutions, traffic of motor cars and bicycles, official register of medicaments, control of patent medicines, extinction of insects noxious to agriculture (May bugs, etc.), protection of young people abroad, relations of vicinage, exercise of patented professions in frontier districts, mortgages on estates divided by intercantonal boundaries, taxation of real estate in boundary districts, navigation police and fisheries in intercantonal waters, etc.

A concordat of great importance is the treaty of Langenthal of 1828, by which the Cantons of Lucerne, Berne, Soleure, and Zug (Argovie, Thurgovie, and Basle adhered later) created a common Roman Catholic bishopric of Basle, since in the period of the revolution the ecclesiastical organization of Switzerland had undergone fundamental changes.

The catalogue of concordats could easily be continued and still to-day new concordats, either of particular or general character, are concluded when the interests of Cantons require a definite and legal regulation of certain interstate relations or if Federal legislation seems to be impracticable at this time.

MAX HUBER.

THE ORIGIN OF THE CONGO FREE STATE, CONSIDERED FROM THE STANDPOINT OF INTERNATIONAL LAW

The partition of Africa, which the present generation has seen accomplished, has yielded a generous by-product in international law. Protectorates, spheres of influence, hinterlands, the position of savage and semicivilized tribes, nominal and effective possession, territorial leases — these are but a few of the topics to which the political apportionment of the Dark Continent has drawn attention and exacted serious consideration. For more than twenty years the position of one of the largest holders of African territory, the Congo Free State, has aroused much discussion. With the serious accusations against Congolese administration press, pulpit, and platform have made the English-speaking peoples familiar. How far these have been proved it is not a part of the present paper to decide. It is enough for our purpose to say that charges of maladministration have been made in the official publications of more than one country, and that protests based upon them have been presented to those responsible for the direction of the State's affairs. No doubt the criticisms of the past few years have tended to hasten the annexation of the Congo, before which Belgium had previously faltered. Leaving aside the details of the annexation, important as they are from another point of view, the change means the substitution of a responsible government for the Congo in place of the former absolute control by a king-sovereign, who for some years had been able, thanks to the mutual jealousies of the powers, to govern as he chose, whatever might have been the limitations upon his activities which treaties had sought to impose. The coercive power of ultranational public opinion, upon which in the last analysis international law depends, has been plainly evident in the case of the Congo State. Public sentiment, transcending national boundaries, has demanded a responsible government for the Congo. It has accomplished prac-

tically all that the concerted action of the powers might have sought to do.

With the annexation of the Congo to Belgium will appear a new relationship — that of a neutralized state holding a colony within neutralized territory. Belgium will succeed, as the acknowledged owner of the Congo, to those conditions to which the Independent State of the Congo was subject. These appear in the various conventions and agreements to which the Congo Free State and its juristic predecessor, the International Association of the Congo, have been a party. The Congo Free State had treaty relations with the principal countries of the globe, the obligations of which Belgium must, of course, assume. Beyond this the Congo State had either signed or adhered to the General Acts of Berlin (February 26, 1885) and Brussels (July 2, 1890), as well as the Convention of Brussels of June 8, 1899.[1] In other words, the Congo Free State has been treated as sovereign and independent during nearly a quarter of a century. As it passes out of existence it is pertinent to review the peculiar conditions of its origin, viewed from the standpoint of international law. As the annexation to Belgium is now (November 15) an accomplished fact, this subject may be approached without propagandist bias.

No part of the larger Congo question has evoked more spirited discussion than this of the origin of the State. How and when did it come into existence? It was created by the powers in 1885, said some. It was a *de facto* state before the powers met in conference at Berlin, said others. It is easy to see why these two antagonistic theories have been advanced. Those who have wanted the powers to "do something" for the natives have insisted that the State was the creation of the powers. Those who sought to defend Leopold's administration elected to regard the Congo State as having had a *de facto* existence prior to the Berlin Conference. This was done in order to support the view that the Congo State, in adhering to the Berlin General Act, did so as an existing sovereign state, yielding no more than did any other signatory — France or Germany, say —

[1] The texts of these treaties will be found in the Supplement to this number of the JOURNAL, at pages 7, 27, and 70.

which had territories affected by the terms of that act. Those who desired the Congo reformed through international action adopted the theory that a state may be called into being by the fiat or mandate of the existing powers. Those who have exalted the independence of the State have rested upon the familiar doctrine that recognition is but a statement of what at the time appears to be the fact.

> The existence of the sovereign state is independent of its recognition by other states. This recognition is the statement of a *fait accompli*, and is also the approbation of it. It is the legitimation of a situation of fact, which is henceforth founded upon law. It is the attestation of the confidence which the states have of the stability of the new order of things.[2]

These words of the distinguished Belgian jurist correctly state the modern rule. Any other position logically leads to intervention on the part of the recognizing state. It is applicable when a state has been formed out of another state, or of parts of another state or states. But in the case of the Congo it is submitted that the rule does not apply. There was no *de facto* state in the Congo basin in 1884, and no one then claimed that there was. It was at that time the theory neither of the powers which recognized the State, nor of Leopold who founded it. This claim of an antecedent *de facto* existence does not appear until after the Berlin Conference, and then as a matter not wholly free from doubt.[3]

Those who maintain the State's antecedent *de facto* existence rest their case upon (1) the cessions made to the predecessor of the Free State, the International Association of the Congo, of political sovereignty by the native African chiefs; or (2) upon rights growing out

[2] Rivier, Les Principes du Droit des Gens, I, 57.

[3] This position is most strongly stated by Cattier (Droit et Administration de l'État Independant du Congo, Bruxelles, 1898), who denies that sovereignty was obtained either through recognition by the powers or through the treaties made at an earlier time with the native African chiefs (p. 43). *Cf.* Banning, Le Partage Politique de l'Afrique (Bruxelles, 1898). M. Rolin-Jacquemyns denied that the Congo State owed, or could owe, its existence to an assembly of diplomats, but elsewhere (Rev. de Droit Int., 1889, 170) he seems to take the opposite view. Liberia is an apparent, rather than real, exception to the doctrine stated in the text.

of the occupation of territory *sans maître;* or (3) upon continuous and effective territorial possession *animo imperii,* following the cession of alleged sovereignty by the native tribes. As to the first of these, much of the discussion has shown a confusion of ideas as to territorial sovereignty and property, between *imperium* and *dominium.*[4] No one within recent times would seriously maintain that *imperium* could be conveyed without any subsequent act or series of acts. As to the second, the occupation of territory *rei nullius,* the modern position is less clear. To deny that savage or semicivilized tribes have any place in international law shocks the modern conscience. It furnishes a basis for the doctrine that such peoples have no rights which civilized nations need respect.

Few would go as far as this, but would admit that while such tribes are not persons in international law (government being the test of civilization), yet they have moral rights as against such persons. There is always a danger of importing the idea of sovereignty into what are really matters of occupation and possession.[5] It is to the third of the positions cited to which attention must be directed in order to decide the question as to whether the Congo State had an existence before the Berlin Conference, or, to be exact, prior to November 8, 1884, when its predecessor was recognized as a state by Germany. As this is a question of fact it is necessary to review the series of events which led up to the Berlin Conference. These group themselves into two classes: First, as to the origin and development of the idea of which the Congo Free State was the realization; and, second, as to the actions of the powers in 1884 looking to the partition of Africa, and in reference to the above idea. Finally, there is to be considered the theory as to the existence of the State held by its founder, Leopold.

I. The interest of Leopold II, King of the Belgians, in African affairs has been constant since September, 1876, when at his invitation forty or more prominent European scientists, statesmen, and publicists assembled at Brussels for the purpose "of discussing and

[4] *Cf.* Westlake, Chapters on the Principles of International Law, IX.

[5] Sir John MacDonnell, Occupation and Res Nullius, Jour. Comp. Leg. 1893, 277–286.

defining the ways to be followed and the methods to be used in order definitely to plant the standard of civilization upon the soil of central Africa." Leopold declared that he had no selfish or ulterior aim, and, although it has been charged that at this early date, when there was no exact geographical knowledge of central Africa, he had colonial aspirations for Belgium,[6] there seems to be no conclusive evidence to prove the assertion. This conference resulted in the organization known as L'Association Internationale pour l'Exploration et la Civilisation de l'Afrique Centrale," or, shortly, L'Association Internationale Africaine. It had at the outset three objects: First, to explore scientifically the unknown parts of Africa; second, to facilitate the opening of roads by which civilization might be introduced into central Africa; and, third, to find means of suppressing the negro slave trade in Africa. The methods for the attainment of these objects were (1) an organization "upon one common international plan" for the exploration of Africa from ocean to ocean and from the Zambesi to the Soudan, and (2) the establishment of scientific and relief stations within this territory. Both of the objects were, therefore, scientific and humanitarian. The methods were to be international, *i. e.*, distinctly nonpolitical. An important and perhaps significant action was the adoption of a flag to cover the proposed expeditions and the stations to be established. At the time this flag was to have a status, if possible, like that of the Red Cross.[7] An international commission was instituted which held a meeting in June, 1877, to formulate further plans. In addition to various national committees of the association there was to be an executive committee, resident at Brussels, under the immediate direction of Leopold, to which the several national committees were to send funds for the prosecution of the work. After the session of June, 1877, the International Commission seems to have done nothing. The various national committees had little or no vitality at any time. What activity Leopold's interest aroused outside of Belgium took the form of national or private expeditions. The Belgian committee, however, energized by Leopold, sent an expedition to Tan-

[6] Keltie, The Partition of Africa (1st ed.), 119.

[7] E. Banning, Africa and the Brussels Conference, London, 1877, 155.

ganyika, which had few results, geographical or otherwise. It served, however, to give continuity to the organization and to perpetuate the name of the association. Even that would probably have remained a doubtful asset had not Henry M. Stanley returned from Africa in January, 1878, with exuberant accounts of the commercial value of the Congo basin. When Stanley landed at Marseilles two agents of Leopold sounded him upon undertaking an expedition to the regions which he had just quitted. In the year following a new organization was formed at Brussels by certain of the members of the former executive committee, to whom were added several financiers. This new group, under the name of the Comité d'Études du Haut Congo, while apparently distinct from the earlier one, was really identical with it in management. It entered into an agreement with Stanley, the exact terms of which have never been made clear. Stanley left Europe for the Congo upon an expedition financed by the new association, which soon changed its name to "L'Association Internationale du Congo."[8] Under all these names the directing authority was King Leopold. Although somewhat disguised, the purpose of the supporters of the Stanley expedition was commercial. With the commercial idea was the embryo, very soon

[8] It is true that the Comité d'Études was organized as a "société en participation" November 28, 1878, with a capital of one million francs. This sum was soon exhausted in the prosecution of the Stanley expedition, and thereafter the necessary funds were supplied by Leopold. The first appearance of the International Association of the Congo is variously stated. Wauters (L'État Independant du Congo, 23) says that the comité changed its name at the end of 1883; Chapeaux (Le Congo, 322), that the comité "took the title" of International Association of the Congo in 1882, as does Vermeersch (La Question Congolaise, 12). Boulger (The Congo State, 26) gives no date, but states that the comité "soon" changed its name. Cattier (*op. cit.*, 19), on the other hand, definitely states that the comité ceased to exist during Stanley's expedition. Leopold's motives for assuming a new name for his work Cattier conjectures to have been based upon the apparent utility "of introducing the word *international*" and of renewing the appearance of internationality with which the earlier African association had been invested. As late as 1884 treaties with the chiefs were still being made in the name of the old International African Association. "Au fond, le nom ne faisait rien. Il designait toujours le même pensée, le même volunté creatrice (Vermeersch, *op. cit.*, 12.)" But when the will became political, the adjective "international" was reassumed. The Belgian Constitution then barred the way to accession of territory.

developed, of political power. The president of the International Association of the Congo (under which title Leopold's undertaking was known until the close of the Berlin Conference) thus directed Stanley at the outset of his work:

> It would be wise to extend the influence of the stations [to be established in the Congo basin] to the chiefs and tribes dwelling near them, of whom a republican confederation of free negroes might be formed, such confederation to be independent, except that the King, to whom its conception was due, reserves the right to appoint the president, who should reside in Europe.

To this it was added that Leopold's purpose was to create, "not a Belgian colony, but a powerful negro state." Stanley replied that he understood that there was no intention of founding a Belgian colony, but that the alternative would be far more difficult. "It would be madness for me to attempt it except in so far as one course might follow another in the natural sequence of things."[9] Between 1879 and 1883 Stanley established several stations on the Congo and had negotiated more than three hundred treaties with the native chiefs.

How far these treaties conferred sovereign rights upon Stanley's principals must be decided by the peculiar, if not unique, circumstances of the case. Had Stanley been acting, for instance, on behalf of an African company chartered under British law, no one would have contended that the British flag did not cover the territories thus sought to be obtained.[10] But Stanley and his associates were not then acting for any company, the creation of Belgian or other municipal law. Had the International Association of the Congo been created by Belgian law, it is probable that Belgium, as against other states, might have acquired *imperium* over the territories which the association, as such Belgian subject, might have obtained. She could not have done so as a matter of domestic law, for the Belgian Constitution at that time forbade the cession, exchange, or addition of territory save by special law.[11] It may well be that the association

[9] The Congo and the Founding of its Free State,

[10] *Cf.* the treaty between the British South African Company and Umtassa, September 14, 1890, quoted by Westlake, *op. cit.*, 151.

[11] Article 68 of the Constitution, as revised in 1893, reads: "The colonies,

remained "international," *i. e.*, having no legal status in Belgium, for the purpose of avoiding the restrictions of the Constitution. As it was a private association merely, certain jurists have sought to prove that individuals can acquire sovereign rights by cession from the heads of quasi-states who possess these rights.[12] The precedents cited for this position, viz, the Puritans in New England, the Quakers in Pennsylvania, the British chartered companies in Africa and Borneo, are not in point. In these cases the individuals or companies acquired *dominium;* the *imperium* belonged to the state to which the individuals or companies owed political allegiance, provided, of course, such state ratified, or acquiesced in, the acts of its nationals. Had the African tribes really been members of international society, and hence subjects of international law, the case might have been different. It is idle to hold that sovereignty may be transferred by those who have no conception of it. Stanley's treaties were evidence that the natives had certain moral, if not internationally legal, rights; and the International Association of the Congo recognized that they had.

Did the International Association constitute a state *de facto,* in the sense that a recognition of its *de facto* existence would, or should, follow in the ordinary course of diplomatic action? A state must have territory, a numerous population, and be politically organized. It must have independence and permanence.

> For all purposes of international law, a state may be defined to be a people permanently occupying a fixed territory, bound together by common laws, habits, and customs, into one body politic, exercising through the medium of an organized government independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all international relations with the other countries of the globe.[13]

Judged by this standard of Phillimore, it can not be seriously contended that the International Association was a state *de facto.*

foreign possessions, or protectorates, such as may be acquired by Belgium, are to be ruled by special laws. Belgian troops for the defense of these can only be recruited by voluntary enlistment." Bull. de la Soc. de Leg. Comp., 1893, 611.

[12] Notably, Twiss and Arntz in Rev. de Droit Int., 1883–4.

[13] Phillimore, International Law, 3d ed., I, 81.

In 1884 its territorial claims were large; it comprised the territory south of the Congo and drained by that river and its affluents. But up to the time of the Berlin Conference there had been no delimitation of its territories. Its population was numerous, it is true, having been estimated at from eleven to thirty millions. But these were the blacks, subject to their own primitive rule of life, dwelling in more or less settled fashion in tribal organizations, just as they had for centuries. Of the whites there were at this time about two hundred and fifty, nearly all of whom were in the service of the association. How many of the blacks were conscious of the existence of the alleged sovereign authority of the association, there is no evidence. Later events lead one to think that they were few. Some of these were tribes which resisted, more or less successfully, all exercise of that authority. Outside the small spheres of the various stations, no actual control over the natives was at first attempted. The association was not even able at all times to maintain uninterrupted communication among its stations. What organization there was for the purpose of enforcing the sovereign will, or of political administration, was the company of two hundred and fifty whites, one white person for each one hundred thousand or so of blacks. Nor was the association in any wise "self-contained." It was directed from Brussels and sustained out of Leopold's private purse. Even as to the whites there is nothing to show that they were bound by any tie of political allegiance to the association. Each servant or officer was recruited for a certain number of years' service. It has never been contended that any of the Belgians in its service foreswore allegiance to Belgium, substituting therefor an allegiance to the International Association of the Congo.[14]

If the International Association of the Congo was not a sovereign state *de facto* in 1884, what, then, was its status? The most striking characteristic of the organization was its artificiality. Leopold was called the founder (fondateur) of the association. Consciously or not, there is imported the idea of an artificial juristic person, the "foundation" of the civil law. The foundation may have scientific

[14] Naturalization in the Congo Free State was established in 1892 by a decree of Leopold of December 27 of that year. Lycops, Les Codes Congolais, 161.

or charitable purposes, as well as religious.[15] Note that only the idea was imported, for the association denied that it was the creation of Belgian or other municipal law.[16]

The International African Association was, potentially at least, such an "ideal juristic person" when it proposed to found scientific and relief stations in Africa. Later, when the International Association of the Congo took its place, there appears the idea of a corporation, having at first commercial and finally political aims. Its character as an inchoate, or as a potential, corporation is of prime importance in connection with the question of recognition. Had it been a corporation organized under the municipal law of any state, its territories might have "belonged" to that state. Recognition gave it a *locus standi,* absolutely necessary owing to the unique and anomalous circumstances of its origin. The association by no test of international law was a state *de facto.* It was an association without legal standing. To have had a charter under Belgian law would have defeated the very ends of the association. The powers gave to the inchoate organization what otherwise it could not have had. In lieu of *de facto* existence, it was called into being *de jure* by the powers, which recognized it in 1884–85. They made it, or, more correctly, they agreed to consider it, a legal entity — a person, not in municipal law (for such it was not), but in international law. It does not greatly stretch the meaning of the term to call it an international legal fiction. Therefore, when the representatives of the powers welcomed at Berlin the appearance of the new State, there was what M. Rolin-Jacquemyns called, by no mere figure of speech, "an international investiture."[17]

II. Whether led by the belief that Leopold was doing his work for the benefit of England,[18] or in order to check the growing colonial power of France, Lord Granville found himself the center of attack when he signed the Anglo-Portuguese treaty of February 26, 1884.

[15] Savigny, Traité du Droit Romain, II, 237. *Cf.* Cuq, Les Institutions juridiques des Romains, II, 794.

[16] Note the apparent exception of the Comité d'Études described above.

[17] Rev. de Droit Int., 1889, p. 170.

[18] Keltie, The Partition of Africa, 1st ed., 143, who quotes an unnamed source for the statement.

The date may be taken as the *terminus a quo* of the really political significance of the Congo project. This treaty recognized the hitherto shadowy title of Portugal to that part of the African west coast through which the Congo River debouches, between 5° 12′ and 8° south latitude. This *volte-face* on the part of Great Britain, which had previously denied Portugal's claims, was denounced by the British press and in Parliament. Leopold appealed to Granville to wait before acting, in order to inquire into the validity of the treaties between Stanley and the native chiefs.[19] More important still were the protests of the continental powers. France declared that she would not be bound by the treaty (March 13). Germany served a like notice (April 18).[20] The Anglo-Portuguese treaty, therefore, allowed France and Germany to make common cause against the power which would have deprived Leopold of an outlet from his territories. While Great Britain and Portugal had agreed upon a joint commission for the Congo River, Germany and France came forward with a proposition for an international commission for the river, such as had been considered some time before by the Institute of International Law. These two Powers were drawn into an *entente* by which Leopold would surely be the gainer. On the 23d of April France had a further and tangible interest in favoring the International Association of the Congo. By an interchange of notes between Strauch, the president of the association, and Ferry, the French Minister for Foreign Affairs, the association engaged (1) never to cede its possessions to any power, and (2) to give France the right of preference (droit de préférence) in case the association were ever forced to alienate them (réaliser ses possessions). As a *quid pro quo*, France agreed "to respect the stations and free territories [*sic*] of the association, and to put no obstacle upon the exercise of its rights (de ne pas mettre obstacle a l'exercise de ses droits)." [21]

[19] Boulger, The Congo State, 42.

[20] Cattier, *op. cit.*, 25, makes the unsupported assertion that Holland and the United States also protested.

[21] Van Ortroy, Conventions internationales concernant l'Afrique, 98. See also Supplement to this JOURNAL. This right of preference in favor of France gave rise to many complications. France announced her right by a circular to the powers (April 23–24, 1884), and, so far as known, none protested. The Congo Associa-

It was by no mere coincidence that just at this juncture the United States recognized the flag of the International African Association, carried by the Congo Association, as "that of a friendly government." Leopold, acting through Mr. Henry S. Sanford, a former minister of the United States to Belgium and member of the old Comité d'Études, managed to obtain from Secretary Frelinghuysen that which Ferry was unwilling to concede, for the French note stopped short of recognition. It was then an open secret in Europe that Leopold had unsuccessfully requested more than one government to recognize the association. The action of the United States came as a distinct surprise, especially in England. The importance of the action of the United States has, however, been overestimated. The movement of forces had already started, the result of which was to give Leopold's work an international status. It was valuable to Leopold in making a precedent, but it does not appear that it materially changed the position of the association. Frelinghuysen signed and the Senate ratified quickly and perhaps without knowledge of the motives which lay back of the request for recognition. The phraseology of this correspondence between Sanford and Frelinghuysen is noteworthy. The association declared that by treaties "with the legitimate sovereigns" there had been ceded to it "territory for the use and benefit of free states, established and being established, * * * to which cession the said free states [*sic*] of right succeed." Free entry of goods into these territories was guaranteed, as well as the right of foreigners to carry on trade there. The United States, sympathizing with and approving "the humane and benevolent purposes of the International Association of the Congo, administering as it does the interests of the Free States there established," recognized the flag as that of a friendly government.

tion ratified the right after its full recognition by France (February 5, 1885). As no exception was made it was feared that France would oppose its right as against Belgium in case the latter State desired to annex the Congo. The question was left open by an interchange of notes between France and the Congo in 1887. By the Franco-Belgian treaty of 1895 the right was confirmed. Although annexation did not then take place, the treaty served to interpret the right: that it would not take priority over Belgium, but that as to other powers both the Congo and Belgium admitted its force.

A few days before the exchange of these notes Bismarck suggested to Ferry that France join Germany in calling a conference of the powers in order to solve the difficulties to which the rival claims to the center of the continent had given rise. To this Ferry consented. In June Bismarck stated in the Reichstag that the enterprise of Leopold had for its object the establishment of an independent state, and, further, that the German Government was favorable to that project. Three days later Granville announced that the Portuguese treaty had been abandoned.[22] The plan of Bismarck, as tentatively put forth, took definite form in September, when France and Germany decided to recognize the association as independent. After outlining the program of the proposed conference, to which Great Britain had by this time agreed, Bismarck stated that Germany would take a friendly attitude with respect to the "Belgian enterprise" on the Congo, as a consequence of the desire of his Government to assure to its nationals freedom of commerce over the whole extent of the "future state of the Congo."

At the time, therefore, when the program of the Berlin African conference had been formulated, it appears that (1) France, Germany, and Great Britain acted upon the assumption that the International Association of the Congo was not a state *in esse*, but a possible state *in futuro;* and (2) that within a few days of the conference at Berlin no power had recognized the association, except the United States, whose recognition, so unique in form and substance, was a sort of collateral incident.

The purpose of Bismarck in calling the conference was to have the powers come to an understanding concerning the Congo basin, in order that this core of the African continent should not be fought over by the rival claimants to territory. France, Great Britain, Germany, and Portugal looked, as colonial powers, toward the center of the continent. With the basin of the Congo unappropriated except by the group of private individuals supported by Leopold, acting privately, a scramble, unseemly if not belligerent, might have engaged those states whose colonial aspirations were leading them thither. To recognize the International Association of the Congo

[22] Wauters, L'État Independant du Congo, 30.

as a legal person, having sovereign power over this region, was Bismarck's method of eliminating a dangerous contest for possession.[23] To subject the area to a régime of commercial freedom was to effect what afterwards came to be known as the "open door." To safeguard this freedom, he further proposed that the territories be neutralized. The invitations said nothing about the International Association. The powers were asked into a conference to come to an agreement upon the questions (1) of freedom of commerce in the basin and at the mouth of the Congo, (2) of applying to the Congo and Niger rivers the principles governing the Danube and other international rivers, and (3) of defining the formalities to be observed in order that new occupations on the coast of Africa might be considered effective. These invitations were sent to the various governments of Europe, whether colonial powers in Africa or not. The United States was also asked to send representatives. Many reasons have been given for this inclusion. The conference was said to be commercial and not political in scope; the United States had already recognized the association and had therefore a friendly interest in the matter. No sufficient reason is to be seen why the United States accepted the invitation, as it had nothing to gain by taking part in the conference. Its representatives, however, rendered Leopold valuable services, for assisting the principal delegate, Mr. Kasson, then minister to Germany, were Henry M. Stanley ("nominally as a geographical expert, but in reality there to look after the interests of his patron, the King of the Belgians")[24], and Mr. Henry S. Sanford, who had already been conspicuous in behalf of Leopold's enterprise.

The representatives of the powers met at Berlin November 15, 1884. On the 8th Germany and the Congo Association signed a convention of friendship and limits. The terms of this document are significant as compared with those used by the United States in the preceding April. Although the flag was recognized as that

[23] And to check English influence over Portuguese Africa.

[24] Keltie, The Partition of Africa, 1st ed., 207. The General Act of Berlin, signed by the American delegates, was not submitted to the Senate for ratification by President Cleveland.

of a friendly state (" d'un État ami," " eines befreundeten Staates "), yet this follows immediately:

> The German Empire is, on its part, ready to recognize the frontiers of the territory of the association and of the new state to be created (du nouvel État a créer, des zu errichtenden Staates) as they are indicated upon the annexed map.

While the conference collectively deliberated, each of the powers (with the exception of Turkey), acting by itself through its representatives at Berlin, recognized the Congo Association, Great Britain being the first after Germany (December 16), followed by Italy (December 19), Austria (December 24), the Netherlands (December 27), and Spain (January 7, 1885). France signed a treaty of limits after a long correspondence (February 5), as did Portugal (February 14). The other powers then followed in recognition in the following order: Russia (February 5), Norway and Sweden (February 14), Denmark (February 23), and finally Belgium (February 23) on the last day of the conference, when the Final Act was signed. It is to be noted that as an expression of the opinions then held by the recognizing governments as to the existing régime upon the Congo each reserved consular jurisdiction.

Following this several recognition, the International Association of the Congo was introduced to the conference as adhering to the terms of the General Act. This introduction came by way of a letter from President Strauch in which he called attention to the accession of a power (" l'avènement d'un pouvoir ") which had for its single mission the introduction of civilization and commerce into central Africa. Addresses of congratulation by the various representatives followed. In them may be further seen the theory held as to the origin of the State. Baron de Courcel, for France, referred to it as a state " territorially constituted to-day with exact limits." Sir Edward Malet expressed the satisfaction with which his Government witnessed the founding of this new State. " We salute the new-born State." Count van der Straten Ponthoz spoke for Belgium: " Thanks to the conference the existence of the new State is henceforth assured." In the same vein was Bismarck's greeting. " I believe," said he, " that I express the views of this conference when

I acknowledge with satisfaction the steps taken by the International Association of the Congo in acknowledging its adhesion to our decisions. The new Congo State is called upon to become one of the chief protectors of the work which we have in view. * * *" The inchoate corporation was now a juridical entity and a political person. The new State was henceforth a member of the family of nations. To quote Rivier: "Le nasciturus etait né."

Like Homunculus:

> Er ist....
> Gar wundersam nur halb zur Welt gekommen.
> Ihm fehlt es nicht an geistigen Eigenschaften,
> Doch gar zu sehr am greiflich Tüchtighaften.[25]

It is impossible within the limits of the present paper to enter into detail as to the results of the Berlin Conference as embodied in its General Act. The scope of the meeting was broader than Bismarck had originally suggested. Certain parts of the General Act refer particularly to the régime for the Congo, though nowhere is the Congo Association mentioned. The terms of the General Act are general and affect all territories with the so-called "conventional free-trade zone" as defined by the act. That the conference applied its stipulations to a territory larger than the mere geographical basin of the Congo was due to the initiative of the American representatives. Mr. Kasson suggested that the "commercial basin" of the Congo should be considered, rather than the geographical one. Stanley urged this plan, but was surprised to notice "a curious reluctance to speak, as if there was some grand scheme of state involved."[26] A matter of policy was indeed involved, for by adopting the so-called "conventional zone" of the Congo, all powers having territory within it were affected. The provisions of the General Act were thereby made to apply not only to Belgian and French Congo, but practically to all territory between the Atlantic and Indian oceans, from the Zambesi to 5° north latitude on the east, and from 2° 30′ north latitude to 80° south latitude on the west. Within this territory there was to be absolute freedom of commerce. No power which exercised rights of sovereignty within the zone was to grant

[25] Faust, II, Act II.
[26] Stanley, The Congo, II, 394.

monopolies or privileges of any kind in commercial matters. The act provided for the protection of the natives:

> All powers exercising rights of sovereignty or an influence in the said territories engage themselves to watch over the conservation of the indigenous populations and the amelioration of their moral and material conditions of existence and to strive for the suppression of slavery and especially of the negro slave trade. * * * The right to erect religious edifices and to organize missions belonging to all forms of worship shall not be subjected to any restrictions or hindrance.

Furthermore, a basis for the neutralization of this conventional basin was adopted by the conference. The neutralization was, however, not compulsory or imposed upon the territories within the zone, but it was voluntary as to each colonial power, or, in other words, it was a system of facultative neutralization. The powers did not thereby assume to guarantee such neutrality, but only to respect it after any power had adopted the régime of neutralization. The adoption of the conventional zone, within which the terms of the General Act were to apply to all powers alike, was of decided advantage to Leopold, for it put the new State upon a footing of equality with other states. No more or greater obligation rested upon it than upon any other power having territorial interests within the zone. The recognition of the association was complete and unconditional. It was not half sovereign or dependent, but fully sovereign.

III. There remains to be considered Leopold's theory as to the existence of the Congo State. In the volume entitled "Codes Congolais et Lois usuelles en vigeur au Congo," prepared in 1900 by M. Lycops, clerk to the Superior Council of the Congo Free State, the text of the Berlin General Act and that of the adhesion thereto by the Congo Association appear as the "preliminaries to the constitution of the State." Following these are what M. Lycops calls the "constitution" of the State. This "constitution" consists of a letter from Leopold to the Belgian Council of Ministers and the resolutions of the Belgian Chambers in reference thereto. In the communication Leopold's own theory of the status of his undertaking is seen. This was that the State had not yet been politically organized; *i. e.*, that the State *de facto* did not even then exist.

> The work created in Africa by the International Association of the Congo has had a great development. A new State has been founded, its

limits have been determined, and its flag recognized by almost all the powers. There remains to be organized on the banks of the Congo its government and administration.

Leopold then asked that the Belgian Chambers give their consent, necessary under article 62 of the Belgian Constitution,[27] for him to assume the headship of the new State, preliminary to the organization of its government and administration.

King of the Belgians, I shall be at the same time sovereign of another State. This State will be independent, like Belgium; and, like her, it will enjoy the benefits of neutrality.

The required assent of the Chambers quickly followed, with the proviso that "the union between Belgium and the new State shall be exclusively personal," that is, that the Congo was to be not an appanage of the King of the Belgians *ex officio*, but of Leopold personally. Of course this was not a constitution in the ordinary acceptation of that term. It was merely the basis upon which the governmental machinery might be organized or constituted. Leopold was not a "constitutional" sovereign, in the sense that his powers were limited by any fundamental law of the State. Unless limited by the terms of the Berlin Act, he became August 1, 1885, the absolute sovereign, or autocrat, of the Congo, controlling absolutely, in theory at least, the inhabitants within the limits marked by the various treaties of delimitation. "The possessions of the International Association of the Congo form henceforth the Independent State of the Congo," Leopold informed the powers in the summer of 1885. At the same time the new State, which by a reversal of the usual order had organized a government after it had been recognized as a state, declared itself perpetually neutral, according to the terms of the Berlin Act. This, as has been suggested, was in no sense a limitation of the State's sovereignty. Nor was any provision of the General Act such a limitation upon sovereignty. The Congo Free State (properly the Independent Congo State, the change of name signifying the change in status), in adhering to the terms of the General Act and in declaring itself neutral, bound itself in no respect

[27] ART. 62. The King can not be at the same time chief of another state without the consent of the two Chambers. Neither Chamber can deliberate upon this question unless two-thirds of its members are present, and the resolution shall not be adopted except by a two-thirds vote of each House.

differently than did any state signing the act. It agreed to lay no import duties, to look after the welfare of the natives, to encourage missions, to create no commercial monopolies. So did every other state signing the act. There was no method under the act by which violations of its terms might be enforced. No offending state could be coerced. All of the signatories were sovereign. In such a case, rupture of diplomatic relations, if another state felt itself aggrieved, a new conference, if there was substantial agreement among the signatory powers as to the serious infraction of the act, practically exhaust the remedies.

Freedom from import duties in the conventional zone, while making for commercial freedom, seriously handicapped the Congo Free State in its internal administration by cutting off a large and necessary source of income. In 1890 the representatives of the powers again assembled, this time at Brussels. The ostensible purpose of this meeting was to take further steps for the suppression of the slave trade. Before the Brussels Conference had progressed far, it developed that an attempt would be made to modify the onerous restrictions of the former act in reference to import duties. A provision for limited import duties was after long debate duly incorporated in the Brussels General Act, for the purpose of better enabling the Free State to wipe out the slave trade. In other respects the Berlin Act stands to-day. The impression has been general that the provisions of that act have been violated; that within late years, at least, the natives have been treated with no due regard for their "moral and material amelioration," such as the act prescribed. When charges of violation of the spirit of the Berlin Act were brought against the Congo Free State answer was made either by way of general denial or by a "*tu quoque*" argument, or else that if there had been some necessary disregard of the means of moral or of material regeneration, the State was within its right, as it was sovereign and independent; that as such sovereign and independent state it was the sole judge of the truth or falsity of the charges. Of course there were other answers, but these three groups comprise most of them. The force of public opinion, however, resulted in the appointment of a commission for the investigation of the charges of maladministration. This commission reported upon certain grave

abuses in the form of labor taxes and of unrestricted forced services demanded both by the State and by the State's concessionary companies. Slowly — too slowly for many active reformers — public sentiment became a force which the absolute sovereign of the Congo did not withstand. A new conference which might review the whole question of the condition of the natives in the conventional zone, both within and without the Congo Free State, was declined by certain of the continental powers when Great Britain proposed it in 1903. The only remaining sanction was that of ultranational public opinion. This, voiced in protests by more than one government, was reflected in Belgium. Leopold had as early as 1889 devised the Congo to Belgium. Later he agreed to permit Belgium to annex it if she so desired, after a term of years. After long negotiations between Belgium and Leopold, the Congo Free State now passes out of existence and becomes in fact what it should have been long ago, a Belgian colony. As a colony it will be subject to government by discussion. In that country where party strife is active, where liberal ideas find such ready expression, responsible parliamentary government must surely be a guaranty that the provisions of the Berlin Act will be observed in spirit as well as in letter.

The Congo Free State has been a political if not a financial failure. Why? The answer, it seems, must be plain. States to be worthy of the name are not artificial productions, even when conceived by the master minds of the great chancelleries. When the powers recognized the International Association of the Congo they agreed to consider something as a state which was in truth not a state. However benevolent the intentions of its sponsors might have been, the effects of creating such an institution to be regarded as sovereign and independent were not foreseen. It was the anomalous character in international law of the State which has made the Congo question so difficult of treatment. The Congo State, not being the result of ordinary conditions, could not be judged by ordinary standards. An unnamed diplomat was well within the truth when he described the Congo Free State, soon after it came into being, as "an anomaly and a monstrosity, from an international point of view; and from that of the future, it was an unknown danger."

JESSE S. REEVES.

PURCHASABLE OFFICES IN CEDED TERRITORY

In the July number of the JOURNAL is given the decision of the Court of Claims in Sanches v. The United States and of the Supreme Court in O'Reilly v. Brooke. Both cases involve the validity of the orders of military governors in former Spanish territory abolishing offices for which a price had been paid and which the holder claimed were private property and thus under the protection of the law of nations and the treaty of peace with Spain. In the Sanches case the office abolished was that of "numbered procurador of the courts of first instance of the capital of Porto Rico;" in the O'Reilly case the office was that of high sheriff of Havana. In each case the opinion was expressed that the office had ceased with the extinction of Spanish sovereignty, but in the Supreme Court case this was not necessary to the decision, as General Brooke's liability had already been denied on other grounds, while the opinion on this point was delivered without argument of counsel, without exposition, and without the citation of authority other than that of the Secretary of War in approving General Brooke's order. It is the opinion of the writer that the holders of those offices were entitled to indemnification. The facts of the O'Reilly controversy will be gone into in considerable detail.

In the year 1728 Don Sebastian Calvo de la Puerta bought at public auction, with the consent of the Spanish Crown, an heriditary and alienable office known as the "alguacil mayor" or high sheriff of Havana. This was a double office — partly national, partly municipal. Its national duties were what gave the office its name and consisted principally in the service of writs. In his national character the high sheriff was an executive officer of the courts. But the patent of his office made him also a perpetual member of the city council of Havana. Connected with the perpetual councilorship apparently, and through it with the double office of high sheriff, was the right to manage and conduct the slaughter of cattle in the public slaughterhouse of Havana and to charge fees therefor. The duties

connected with this right do not seem to have been considered part of the duties of office but rather as incident to the right, which was considered one of the emoluments of the office. When considered as duties of the office, however, they have been classed as municipal and not national. For the service of writs the high sheriff was entitled to fees fixed by law.

By the law for the reorganization of the municipal councils of Cuba of July 27, 1859, it was provided that an investigation should be made as to the proper compensation for the assignable offices in the municipalities, with a view to the abolition of those offices on the payment of the compensation fixed. The office of the "alguacil mayor" of Havana, by reason of its large returns, was to be the subject of special investigation. No final action was taken under this law, however, and the high sheriff continued to be a member of the municipal council until in 1878 the governor-general of Cuba published a decree that the perpetual councilors should cease to perform the duties appertaining to them and should no longer be considered members of the municipal council, but that they should be deprived of no emolument until the proper indemnification provided for by the law of 1859 had been paid. The double office of the high sheriff was affected to the extent that he was a perpetual councilor. Other provision seems to have been made subsequently for the service of writs. At any rate, this latter function seems to have fallen to decay, so that at the time of the American occupation all that was left of the office seems to have been the right to its emoluments, which consisted of the slaughterhouse privilege. That the latter was valuable is shown by the fact that a one-half interest in it was sold on an execution sale in 1895 for $70,000. Through the extinction of the male line of the purchaser of 1728, the office of high sheriff had passed to Count O'Reilly, the husband of the daughter of the previous high sheriff, and at the time of the American occupation the owner by inheritance was the Countess O'Reilly and Buena Vista. In performing the services connected with the slaughterhouse privileges she then employed seventy workmen, fifty men, and more than twenty carts.

The military occupation of Havana by the American forces oc-

curred January 1, 1899. The treaty of peace had been signed December 10, 1898. Ratifications were exchanged April 11, 1899. Acting on the recommendation of the Havana finance commission, General Ludlow, as governor of Havana, issued an order on May 20, 1899, terminating "the hereditary grant or privilege in connection with service of the city slaughterhouse, of which the O'Reilly family, its grantees or lessees, are now the beneficiaries," directed the city of Havana to make provision for the services in connection with the slaughterhouse, and intimated that the beneficiaries of the old privilege might seek such relief as they were entitled to in the courts. This order was to go into effect June 1. Appeal was taken to General Brooke, military governor of the island of Cuba, who did not confirm the order appealed from, but, instead, issued the following:

It being considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and as a measure demanded by public policy and in harmony with preceding orders of the military government, in view of the condition of affairs created in this island by the cessation of Spanish sovereignty, the old alienated office known as "alguacil mayor de la Habana," together with all rights, duties, and privileges pertaining thereto, or derived therefrom, are hereby abolished, and the right of the claimants to ownership thereof of exercising said office or receiving any of the emoluments, attributes, prerogatives, or any kind of benefit or rights whatsoever that have heretofore been enjoyed therefrom by said claimants to ownership are hereby denied.

The municipal corporation of Havana, therefore, may adopt proper measures and provide the necessary means of performing the municipal services heretofore discharged by the claimants to ownership of said office as attributes, prerogatives, or duties attached to the same.

From this order an appeal was taken to Mr. Root, Secretary of War, who referred the matter to the Hon. Charles E. Magoon, Law Officer of the Division of Insular Affairs of the War Department. The report of Mr. Magoon was unfavorable to the petitioner, and pursuant to that report Mr. Root, December 24, 1900, made the following determination:

I can not assent to the proposition that the right to perform any part of the duties or receive any part of the compensation attached to the office of sheriff of Havana, under Spanish sovereignty, constituted a perpetual franchise which could survive that sovereignty. The fact that the Spanish Crown permitted an office to be inherited or purchased does not

make it any less an office the continuance of which is dependent upon the sovereignty which created it.

The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the State. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the military governor to make a new provision under which this part of the power of the new sovereignty, which took the place of the sovereignty of Spain, should be exercised and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

The question whether by reason of anything done before that time the right to compensation from the municipality of Havana has arisen is a question to be determined by the courts of Cuba.

The application for the revocation of the order heretofore made herein by the military governor of Cuba is denied.

Action was then brought in the district court for the southern district of New York against General Brooke on the ground that his order was contrary to the Constitution and laws of the United States and in violation of the provisions of the treaty of Paris and of the instructions of the President of the United States, that it was a confiscation of the plaintiff's property, and was wholly unlawful, tortious, and unauthorized on the part of the defendant, and that it was also in contravention of the Spanish law of 1859 and of the decree of 1878. Judgment was demanded for damages alleged to amount to $250,000. Nothing was said in the complaint as to the appeal to the Secretary of War. The defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. Judge Holt, before whom the demurrer was argued, overruled it on the ground that General Brooke's order was not a governmental act; that under the Spanish law the Countess O'Reilly could not be deprived of her rights in this franchise until its value had been determined and paid to her, and that accordingly the facts as stated in the complaint amounted to a tortious interference with private property on the part of the defendant.[1]

The case then came to trial, and in defense it was urged that the

[1] 135 Fed. Rep., 384.

abolition of the plaintiff's right or franchise to slaughter cattle in Havana was justified as an act under the police power in the interests of the public health, and that the United States Government having ratified the action of General Brooke in abolishing the plaintiff's franchise, the plaintiff had no longer any claim against General Brooke. The first defense, that the order was an exercise of the police power, Judge Holt refused to allow, but he upheld the second defense, that by the action of the Secretary of War and the ratification provision of the "Platt Amendment" General Brooke's order had been ratified by the Government of the United States, or of Cuba, or of both, and that this relieved General Brooke from liability, and dismissed the complaint. He expressed the opinion, however, that the plaintiff had a just claim for damages against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both Governments.[2]

The case was then taken up on writ of error to the Supreme Court of the United States, where the opinion was delivered by Mr. Justice Holmes.[3] The court said that the plaintiff necessarily assumed that her rights followed the ancient conception of an office and were an incorporeal hereditament, susceptible of disseisin, and asked if such were the case why the disseisin was not complete before General Brooke had anything to do with the matter, or why he should be liable for the continued exclusion of the plaintiff by the United States and Cuba, but that it was hard to admit that the notion of disseisin could be applied to such disembodied rights. If not, that all General Brooke could be held for, if for anything, would be damages for the disturbance to the plaintiff while he was in power, which were not the object of the suit. But, the court continued, if the plaintiff were disseised, it would be a question whether such disseisin was a tort within the meaning of the sixteenth clause of Revised Statutes, section 563, giving the district courts jurisdiction "of all suits brought by an alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States," under which the jurisdiction of the

[2] 142 Fed. Rep., 858.
[3] 209 U. S. 45.

district court had been invoked. Putting aside these questions, the court then proceeded to dispose of the case on its merits, basing its decision on what might be gathered from the pleadings, coupled with matters of general knowledge. Without considering then whether ratification was needed, they held in the first place that " where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act." In the second place, they agreed " with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it could no longer be exercised, the right remained so far that it was to be paid for, and if it had been paid for the right to the emoluments would have ceased. If the rights to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States Government, and unless it did the plaintiff's case is at an end." The judgment of the district court was accordingly affirmed.

It will be noticed that the Supreme Court, in following the Secretary of War, held that the right to perform any part of the duties or receive any part of the compensation attached to the office of high sheriff of Havana ceased with the extinction of Spanish sovereignty, but that they did not specify when Spanish sovereignty became extinct. Mr. Magoon, in his report, went further and held that Spanish sovereignty passed away with the American occupation. It will be necessary to examine his position first, as the determination of the Secretary of War was based on his report without citing

authority, and the Supreme Court followed the Secretary of War, likewise without citing authority. Mr. Magoon's first contention was that the authority of complainant to administer the office of high sheriff ceased upon the establishment of the military occupation of Havana. He based this on article 6 of Lieber's Instructions for the Government of Armies of the United States in the Field, which is as follows:

> All civil and penal *law* shall continue to take its usual course in the enemies' places and territories under martial law (military government), unless interrupted or stopped by order of the occupying military power, *but all the functions of the hostile government — legislative, executive, or administrative — whether of a general, provincial, or local character, cease under martial law (military government), or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.*[4]

Mr. Magoon then goes on to say:

> I understand this instruction to mean that it requires an affirmative act of the invader to abrogate the civil or penal *laws*, but the authority of legislation, execution, and administration of all laws passes to the military occupant as a result of the occupation and without further affirmative act or declaration. Should he thereafter desire to confer the right to exercise any or all of said powers upon the persons previously exercising them, or other persons, an affirmative act is necessary.

From this he concludes that the authority of the claimant passed to the occupier by the fact of occupation, even though it were conceded that the office itself did not become *functus officio* thereby.

It is submitted that this interpretation of the instruction is erroneous. That Dr. Lieber did not intend it is shown by articles 26 and 39 of the Instructions, which are as follows:

> 26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel everyone who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.
>
> 39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war — such

[4] The italics are Mr. Magoon's.

as judges, administrative or police officers, officers of cities or communal governments — are paid from the public revenues of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

In article 26 Dr. Lieber used "expel" in the sense of "remove from office." That this was understood by the framers of the original project for the Brussels Declaration, which was largely based on the Instructions, and which, as modified by the Brussels Conference, was in turn the basis of the Hague Regulations, is shown by paragraph 4 of that project, which is as follows:

> The military authority may require the local officials to undertake on oath, or on their word, to fulfill the duties required of them during the hostile occupation; it may remove those who refuse to satisfy this requirement, and prosecute judicially those who shall not fulfill the duties undertaken by them.

If the authority of these officials ceases by the fact of occupation itself there would be no meaning to the rule that they can be removed if they refuse to take an oath of fidelity to the occupier. So article 39, in providing that those officials who continue the work of their office (functions) shall continue to be paid until the military government wholly or partially discontinues it, negatives the idea that their functions are discontinued by the occupation itself.

It seems clear, then, that the interpretation put on the sixth article is erroneous. To have warranted the interpretation placed on it, it would have had to read that functions should continue only *with the express authorization* of the occupier, instead of "only with the sanction." The difficulty arose from Dr. Lieber's dealing with two distinct situations in the second half of his article. If it had stopped with "cease under martial law" the contrast between the two sections of the article would have been appropriate and the article would have stated the well-settled proposition that the laws specified continue in force after occupation, unless interrupted or stopped, but that the functions of the hostile government cease for the period of the occupation through the fact of occupation itself.

But it is the functions of the hostile government, its right to direct officials in the occupied territory, which cease for the period of the

occupation, and not the functions of the local and civil officials acting only in discharge of their legal duty and independently of their government. The remainder of article 6, commencing with "or continue only with the sanction," etc., does not have much meaning unless applied to the functions of the civil officials of occupied territory acting independently of their own government, but it is clear that the contrast between the effect of occupation on the *law* of the occupied territory and on the *functions* of the hostile government applies only to the hostile government itself or its governmental officials in the territory. This distinction between officials identified with the hostile government and strictly local or civil officials will be best brought out in connection with the second contention in the report.

Mr. Magoon's second contention was that the office of high sheriff of Havana became *functus officio* by the fact of occupation. He says:

> If the high sheriff of Havana was an officer of the Crown of Spain, similar in character to that of the Spanish governor-general of Cuba or the Spanish governor of the Province of Havana, it would seem unnecessary to produce argument to show that, upon the military occupation of Havana being established, the office and appurtenant rights, privileges, and authority passed away with the sovereignty upon which the office depended and of which it was an instrument, agent, or vassal. If the officers of the previous sovereignty remain in office and continue to exercise the powers derived from the previous sovereignty, wherein has the previous sovereignty been displaced?

Two propositions are assumed here which are entirely inadmissible: that sovereignty is displaced by military occupation, and that, accordingly, military occupation abrogates offices. Under the old theory of conquest it was held that on an invader acquiring firm possession of the hostile territory sovereignty over that territory and its inhabitants passed to him, subject to revestment by reoccupation or the treaty of peace. Such was the well-settled law prior to the French Revolution, and the inhabitants of the occupied territory were liable to take the oath of allegiance to the occupant and to compulsory military service in his armies. The renunciation of wars of conquest by the French people in the Constitution of 1791, however, resulted in a change of the doctrine that the inhabitants of territory

firmly occupied by the French armies became French, and this was embodied in a decision of the Court of Cassation in 1818.[5] A decision of a similar nature emphasizing the provisional nature of military occupation until the termination of war was made some years afterwards by a German university in the case of the debts and domains of Hesse-Cassel confiscated or alienated by Napoleon the First.[6] In 1844 this doctrine was incorporated into the work of the great German publicist Heffter. Since then it has become universally accepted by publicists of every nationality, and numerous applications of it are embodied in the Hague Regulations. Dicta embodying the old doctrine of conquest during war are to be found in United States v. Rice [7] and Fleming v. Page,[8] but they are merely survivals of the old doctrine and without authority to-day. The true doctrine was early expressed by Chief Justice Marshall in the case of the American Insurance Co. v. Canter,[9] when he said:

> The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed.

As Mr. Magoon's second proposition, that the office of high sheriff became *functus officio* through the fact of occupation, was based on the proposition that the occupation displaced Spanish sovereignty, the two propositions must fall together. The exercise of sovereign power by Spain was suspended by the military occupation, but the Spanish sovereignty was not displaced until the exchange of ratifications of the treaty of peace. In fact, the position that any office is abolished by the fact of occupation alone is inadmissible. Offices exist by law, whether the law proceeds from a legislature or the executive, and the effect of military occupation may be to suspend but it does not extinguish them.

But although Spanish sovereignty was not extinguished by the

[5] T. Ortolan, *Diplomatie de la Mer*, 1, 292.
[6] III Phillimore, 841.
[7] 4 Wheaton, 246.
[8] 9 Howard, 603.
[9] 1 Peters, 542.

military occupation, it was extinguished by the exchange of ratifications of the treaty of peace, and what the report has to say on the effect of the extinction of sovereignty on offices, while not applicable to military occupation, is applicable to the condition of affairs which arose out of the relinquishment of Spanish sovereignty in the treaty.

It will be remembered that Mr. Magoon's second contention was that if the office of high sheriff of Havana was similar in character to that of the governor-general of Cuba or to that of the governor of Havana, it passed away with Spanish sovereignty. The distinction he had in mind between offices which do not pass away with the extinction of sovereignty and those which do was based on a passage quoted by him from an opinion of the Attorney-General to the Secretary of War dated July 10, 1899. As that opinion is a valuable statement of the law on this point it will be quoted with considerable fullness.

The opinion of the Attorney-General was in reply to six questions by the Secretary of War, the first four of which are as follows:

1. Are the Spanish laws and regulations of municipalities in the dependencies of Spain now in force in Cuba as they existed at the time the island was relinquished by Spain?
2. Are the provisions of said laws and regulations, which required the assent and approval of the officers of the Crown of Spain to the various acts of the municipal authorities, now in force in Cuba?
3. Did the authority and power of said officers of the Crown of Spain, under said laws and regulations, pass to the officers of the United States now in charge of the government of civil affairs in said island, and may such authority now be exercised by said officers of the United States?
4. What direction and control over the action of the municipal authorities of Havana in the matter of engaging in the construction of public works for said city, by contract, may properly be exercised by the officers of the United States now discharging the functions of civil government in Cuba.[10]

In answer, the Attorney-General said:

By well-settled public law, upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of said territory until the new sovereignty imposes different laws or regu-

[10] 22 Opinions of Attorneys-General, 527.

lations. Those laws which are political in their nature and pertain to the prerogatives of the former government immediately cease upon the transfer of sovereignty. Political and prerogative rights are not transferred to the succeeding nation. Such laws for the government of municipalities in said territory as are not dependent on the will of the former sovereign remain in force. Such laws as require for their complete execution the exercise of the will, grace, or discretion of the former sovereign would probably be held to be ineffective under the succeeding power. So that any inchoate rights or grants made by a municipal body in Cuba while under Spanish sovereignty, which for their completion required the assent or approval of the Crown or of the Crown officers, would, in the absence of such assent or approval made prior to the treaty of cession, be ineffective and incomplete. The authority and power of the Crown and of the Crown officers in such instances did not pass to the officers of the United States, because the royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

In other words, municipal organizations and the laws with regard to them continue after the change of sovereignty until the new government directs otherwise, while the Crown, Crown offices, and the laws with regard to them pass away with the sovereignty which created them. The latter are what the Attorney-General terms laws pertaining "to the prerogatives of the former government." They are an instance of the more general "political laws" which the Attorney-General also mentioned as abrogated by this extinction of sovereignty, and were specified because of their application to the questions which the Attorney-General was asked. As this distinction of the Attorney-General is well settled, and as it was accepted by Mr. Magoon in his report and by the War Department in its conduct of affairs in Cuba, it is not thought necessary to go into the authorities in support of it. The only question that remains is that asked by Mr. Magoon: "Was the office of high sheriff political in character, and did it pertain to the prerogatives of the Spanish Crown?" The latter part of the question might be put more succintly in the terminology of the Attorney-General, Was he a Crown officer? Certainly not in his municipal capacity, for it was municipal officers that the Attorney-General was contrasting with Crown officers. Nor would it seem in his capacity as an officer of the courts. What the

Attorney-General meant by a Crown officer was one through whom the " will, grace, or discretion " of the Crown would be exercised or, in other words, one who was a governmental officer, representing the policy of the Crown. This would not apply to one whose only national function seems to have been the service of writs. This brings us to the distinction between political or governmental and civil officers.

The distinction is one familiar to the law of military occupation in time of war. It is there used to indicate those officers whose authority is suspended during the occupation because of the closeness of their identification with the hostile government itself. If military occupation is followed by the cession of the territory, the laws pertaining to their offices, which were suspended during the occupation, are abrogated. It was to this class that the office of governor-general of Cuba and governor of Havana belonged.

Just where the line is to be drawn between political officers and nonpolitical officers is impossible to say, but the clearest examples of nonpolitical officers are those given by Dr. Lieber in article 39 of his Instructions, already quoted, namely, " judges, administrative or police officers, officers of city or communal governments." Rivier [11] makes the same classification. He says:

> In default of orders or instructions it would appear natural that the political functionaries, organs of the government, should retire, while the purely administrative functionaries and employees would do well not to desert their posts. * * * According to the distinction established above, prefects, subprefects, governors, etc., ought to retire; in any case their continuance in office would be most difficult. Their adhesion to the enemy occupation would strongly resemble treason. It is entirely different with municipal and communal authorities, mayors, etc., agents of police, teachers, etc.

Numerous authorities to the same effect could be cited if desirable. What is noteworthy of all of them is that municipal officers and the officers of the courts are the typical examples of nonpolitical officers. If all the functions of the high sheriff had continued to be exercised, therefore, they would have been of the typical nonpolitical class.

Nor is the position that the office of high sheriff was a nonpolitical

[11] II, 304, 305.

office weakened by anything said in the report. Probably all Spanish officers were offices of the Crown at the time the *cédulas* were issued that are cited in the report, in the sense that their creation and provision was a royal prerogative, but this does not bring them within the meaning of the rule laid down by the Attorney-General. It is true, also, that the police power is one of the highest and most despotic powers of sovereignty, and that our courts have held that it can not be alienated, but health officers are not what are called political officers. It is a familiar fact that a very large part of the police power is exercised by municipal officers and these are of all officers the ones that are nonpolitical in the sense of the law in question. The continuance of these nonpolitical officers in authority did not involve a continuance of the sovereignty of Spain. It need have meant nothing more than that the law of nations, which is a part of the law of all civilized nations, decrees that the nonpolitical laws and the nonpolitical officers under the old sovereignty shall be the laws and officers under the new sovereignty until the new sovereignty shall decree otherwise. It seems clear, therefore, that, according to the rule of the law of nations laid down by the Attorney-General, the relinquishment of Spanish sovereignty did not abrogate the office of high sheriff of Havana. Much of the same reasoning would apply to the Sanches case. The plaintiff there was an officer of the courts and therefore not a political officer.

The invalidity of the contention in the report that the office of high sheriff was abrogated by the military occupation is fatal to the proposition depending on it that the complainant should have sought relief under Article VII of the treaty of peace for injuries prior to the exchange of ratifications instead of Article VIII, which declares that the relinquishment of Spanish sovereignty should not impair private property rights, and to the proposition also depending on it that if the office were property it was property situated in the track of war and destroyed by war for which the owner was entitled to no compensation.

If, then, the slaughterhouse privilege of the Countess O'Reilly was not abrogated by the American occupation or by the extinction of the sovereignty of Spain in Cuba, was it abrogated by the order of

General Ludlow of May 20, 1899? If the reader will refer to that order he will notice that the privilege is not referred to as appurtenant to any office. The reason for this will be shown by the following quotation from the report of the Havana finance commission to General Ludlow, on the recommendation of which he had made the order:

> In the larger slaughterhouse, where only cattle are killed, the commission found that the descendants of the Count O'Reilly y de Buena Vista held a monopoly on the right of carrying the dressed beef to the butcher shops, for which they were allowed to charge 50 cents a carcass. This monopoly originated in 1706 as a Crown grant to the high constable (alguacil mayor) of the city of Havana, as a partial payment for the services which he rendered in that office, and as a sanitary measure. This office has long ceased to exist.[12]

It is evident that the order was based on the supposition that the "concession," if ever attached to the office, had become independent of it. That the recommendation of the committee was not based on considerations of public health is shown by their statement that "the commission investigated the management of the slaughterhouses and found it businesslike and efficient" and by the fact that the city continued to employ the subcontractor to whom the concession had previously been leased. The measure was one of finance and not of police power, and the commission reported that the revenue of the city had been increased about $10,000 a year by this change alone.

If, as was assumed in the order, the slaughterhouse privilege had been independent of the office, the legality of the order would have been open to serious question independently of the authority of the particular officer issuing the order. At best it would have amounted to the taking of a private franchise under the power of eminent domain with the unsatisfactory provision for compensation that the owners should get what relief they might in the courts. The privilege would have been somewhat similar to the private monopoly held to be property by the United States Supreme Court in the Slaughter House cases, subject to revocation without compensation under the police power but not to be arbitrarily taken from one person and granted to another. The objections to the validity of the order were

[12] Report of the War Department, Vol. I, part 3, p. 287.

sufficient to cause General Brooke, instead of confirming it, to issue a new order " in harmony " with it.

It is hard to see, however, how the privilege could have become disassociated from the office. There is no evidence that the office of high sheriff had ever been formally abolished. He had ceased to be a member of the city council by the law of 1878. Possibly also the law of civil procedure had made other provision for the service of writs; while if the duties in connection with the slaughterhouse be considered as incident to the emoluments rather than as duties of the office, he had even ceased to perform any of the duties of the office. But the right to the emoluments of the office expressly remained, and while that right remained and the office was not formally abolished it is hard to say that in a legal sense the office was extinct. Counsel for the Countess O'Reilly based their contention that the privilege had become disassociated from the office on the theory that the laws of 1859 and 1878 had abolished the office and substituted a contract between the city and the holder of the old office and his successors, whereby the latter were to continue in their slaughterhouse privileges pending indemnity. If the office was not abolished the contract theory falls with it.

The possibility of placing the abolition of the slaughtering monoply on stronger ground than General Ludlow's order evidently became apparent to the authorities in Cuba and General Brooke's order squarely abolished the office of high sheriff itself. The language of the order would bring it under the police power, but Judge Holt, after an examination of the facts on the trial, held that it had not been issued under the police power, and as that holding has not been questioned it will be taken that the order was an exercise of the power which the United States had to reorganize government in Cuba. It will also be taken that the order was ratified by the governmental authorities of the United States and that therefore it was the act of the United States as intervening Government. In examining the order, it will be necessary to consider whether there was a right of private property to the emoluments of the office, whether General Brooke's order abolishing the office was valid, and whether any liability for indemnification resulted therefrom.

That the office or at least the emoluments of the office were private property under the Spanish law is hardly open to question. None of the provisions of the Spanish law given in Mr. Magoon's report contradict this. The royal *cédula* of October 15, 1787, quoted in the report, which declared that the incumbents of these offices were not "authorized to dispose of the same at will as any estate of their patrimony," recognized that they constituted estates, although not as freely alienable as other estates. They could be revoked at the will of the Crown subject to indemnification, and only a half interest was subject to sale on execution. If any other authority than the provisions quoted in the report are necessary, the following extract from article 336 of the civil code of Spain which was made applicable to Cuba in 1889 is conclusive:

> As personal property are also considered: rents or pensions, either for life or hereditary, in favor of a person or family, * * * also purchased public offices, contracts for public services, etc.

Much other authority could be given in support of this, but it is not necessary.

That the laws with regard to the office of high sheriff, and particularly the municipal aspects of the office, remained in force after the relinquishment of Spanish sovereignty has already been shown. The same is true of the laws of property. The grant held by the Countess O'Reilly, therefore, had, even after the ratification of the treaty of peace, a double aspect: on the one hand it was a grant of public office; on the other, a grant of private property.

As to the power of the United States Government in Cuba, no better exposition of it can be given than that of the Attorney-General. In the passage already quoted he says:

> The royal prerogatives and political powers of one government do not pass in unchanged form to the new sovereign, but terminate upon the execution of a treaty of cession, or are supplanted by such laws and rules as the treaty or the legislature of the new sovereign may provide.

He then goes on:

> Cuba, however, is now under the temporary dominion of the United States, which is exercising there, under the law of belligerent right, all the powers of municipal government. In the exercise of these powers the

proper authorities of the United States may change or modify either the forms or the constituents of the municipal establishment; may, in place of the system and regulations that formerly prevailed, substitute new and different ones.

The United States had the right to reconstruct the government of Cuba. This did not result from any transfer of the political powers or royal prerogatives of the Spanish Government to the United States, but from the authority arising from the fact that the United States Government was the *de facto* government of the island. No methods of procedure in the abolition of offices which had been binding on the Spanish authorities were therefore binding on the authorities of the United States, but in exercising this undoubted authority she was bound to recognize any rights under the treaty of peace or the law of nations that were compatible with it. She was free to abolish public offices, but if those offices were also recognized as private property under the prevailing law she was bound to indemnify the holders thereof, both by the law of nations, which protects private property on cession, and the treaty of peace, which was an expression of the international rule. General Brooke's order, therefore, was valid, but the international obligations of the United States could have been satisfied only by disassociating the slaughterhouse privilege from the office and conferring it on the holders of the old office or by the payment of its value. It is submitted that the opinion of Judge Holt, that the Countess O'Reilly had "a just claim for damages for the destruction of her property, against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both Governments," [13] is unassailable. Likewise it would seem that the claim of Guillermo Alvarez y Sanches was just.

PERCY BORDWELL.

[13] 142 Fed. Rep., 863.

HISTORY OF THE STATE DEPARTMENT

III

THE NEW DEPARTMENT

During the interval between the inauguration of the President and the formation of the Executive Departments, the old Departments performed such executive duties as were indispensable. On July 11, 1789, for example, "by the hands of Mr. Jay," Washington sent to the Senate for ratification a consular convention with France. On July 22 the Senate —

> *Resolved,* that the Secretary of Foreign Affairs under the former Congress be requested to peruse the said convention and to give his opinion how far he conceives the faith of the United States to be engaged, either by former agreed stipulations or negotiations entered into by our minister at the court of Versailles, to ratify in its present sense or form the convention now referred to the Senate.

Jay reported July 25, as "The Secretary of the United States for the Department of Foreign Affairs, under the former Congress."[1]

Even as late as October 3, 1789, Diego de Gardoqui, charged with negotiations for Spain, wrote to Jay: "Observing that you continue to exercise occasionally the office of Secretary of State," he announced that he would leave Don Joseph de Viar in charge of negotiations while he should be absent.

Jay replied October 7, 1789, that he would receive Mr. de Viar —

> Circumstances having rendered it necessary that I should continue, though not officially, to superintend the Department of Foreign Affairs until relieved by a successor.[2]

On May 7, 1789, Jay submitted the estimates for the "Office of Foreign Affairs" to the "Commissioners of the Treasury." The "establishment of the office" was as follows:

[1] American State Papers, Foreign Affairs, 1, 89.
[2] Dept. of State MSS., American Letters, Vol. IV.

John Jay, Secretary of the United States for the Department of foreign Affairs	3500
Henry Remsen Junr Under Secretary in the office for foreign affairs	800
George Taylor Junr, Jacob Blackwell — Clerks at 450 dolrs each	900
John Pintard, Interpreter of the french language	250
Abraham Okie, Doorkeeper and Messenger	150

Contingent Expences of the Office.

These expences are somewhat uncertain. The amount of them from 24th May 1788 to 7th May 1789, including the allowance to the Interpreters of the Spanish, German and Dutch languages who receive at the rate of 2s per hundred words for translating is about	150
Office rent	200
Dollars	5950

Foreign Ministers, &c, &c.

The Honbl Thomas Jefferson, Esqr Minister Plenipotentiary at the Court of France	9000
William Short Esqr private Secretary to Mr. Jefferson 300 Louis d'ors a year	
The Honble William Carmichael Esqr Chargé des Affaires at the Court of Madrid	
Qu. is Mr Carmichael's salary to be regulated by the Act of Congress of 4th October 1779, or by that of 11th May 1784?	
Thomas Barclay Esqr Consul General for France now in America	1000
Charles W. F. Dumas at the Hague	1300

Contingent Expences.

Postage and Couriers have been uniformly charged and some other articles, and in a certain instance House Rent has also been charged, but not yet decided upon. The accounts are at the Treasury, and their amount in ordinary will furnish a Rule for estimating these contingent expences.[3]

Until there was a Secretary of State letters to the President on such subjects as belonged to the State Department were sent by the President's secretary to Roger Alden:

UNITED STATES *January 12, 1790.*

SIR,

I am directed by the President of the United States to transmit herewith to you, to be lodged in the office of State with other public papers under your care, and to be delivered to the Secretary of State whenever he may enter upon the duties of his office, the Form of the adoption and

[3] Dept. of State MSS., American Letters, Vol. IV.

ratification of the constitution of the United States by the State of North Carolina, which has been officially communicated to him by the President of the Convention of said State; and likewise a letter which accompanied the above form of Ratification from Samuel Johnston President of the Convention of the State of North Carolina to the President of the United States.

TOBIAS LEAR,

ROGER ALDEN, Esquire.[4] *S. P. U. S.*

When the Senate called on Jay for an opinion with reference to the consular convention with France, it was merely following the habit of the old Congress, which on such an occasion would have called upon the Secretary of Foreign Affairs. It should properly have addressed the President, who, in accordance with the new order of things, was completely responsible for the conduct of the foreign relations of the United States. The Senate itself recognized early that it had no direct participation in these affairs, as the following letters show:

UNITED STATES *December 8, 1790.*

The SECRETARY OF STATE.

SIR,

In obedience to the command of the President of the United States, I have the honor to transmit herewith sundry communications of the proceedings of Government in the Western Territory from January to July 1790, made by the Secretary of the said territory to the President of the United States, upon which the President requests your opinion as to what should be done respecting them.

I have likewise the honor to transmit, by the President's order, a letter and packet from the President of the national Assembly of France directed to the President and members of the American Congress; this direction prevented the President from opening them when they came to his hands — and he yesterday caused them to be delivered to the Vice-President that they might be opened by the Senate — The Vice-President returned them unopened with an opinion of the Senate that they might be opened with more propriety by the President of the United States, and a request that he would do it, and communicate to Congress such parts of them as in his opinion might be proper to be laid before the Legislature.

The President therefore requests that you would become acquainted with their contents and inform what (if any) should be laid before Congress. Another letter from the National Assembly addressed particularly to the President is inclosed herewith for your perusal. The President has the translation of this letter. TOBIAS LEAR,

S. P. U. S.

[4] Washington Papers, Record Book, Vol. 20.

Jefferson replied:

DEPARTMENT OF STATE,
December 9, 1790.

The PRESIDENT OF THE UNITED STATES,

SIR,

I have now the honor to return you the letter from the President of the Assembly of Representatives of the Community of Paris to the President and Members of Congress, which you had received from the President of the Senate with the opinion of that house, that it should be opened by you, and their request that you would communicate to Congress such parts of it as in your opinion might be proper to be laid before the legislature.

The subject of it is the death of the late Dr. Franklin — it conveys expressions from that respectable city to the Legislature of the United States of the part they take in that loss, and information that they had ordered a solemn and public oration for the transmission of his virtues and talents to posterity, copies of which, for the members of Congress, accompany this letter: and it is on the whole an evidence of their marked respect and friendship towards these United States.

I am of opinion their letter should be communicated to Congress, who will take such notice of this friendly advance, as their wisdom shall conceive to be proper.

TH. JEFFERSON.[5]

Under the new Government the Secretary of the Treasury was made directly accountable to Congress in certain financial matters; beyond this the heads of Departments were wholly subordinate to the President, and had no powers independent of him. The act creating the Department of Foreign Affairs said the Secretary must perform "such duties as shall, from time to time, be enjoined or intrusted to him by the President of the United States, agreeable to the Constitution." The act creating the Department of State said he was to receive from the President bills, orders, and resolutions of Congress; must keep the seal of the United States and affix it to the commissions of civil officers appointed by the President, but must not affix it to any commission until it had been signed by the President, "nor to any other instrument without the special warrant of the President therefor." The President must even approve the device of the seal to be made for the Department.

[5] Washington Papers, Record Book, Vol. 20. See also Writings of Jefferson (Ford), V, 258.

As the bill providing for the Department of Foreign Affairs passed the House, the Secretary could not even appoint his Chief Clerk, except with the approval of the President; but the Senate modified this provision and left this appointment wholly with the Secretary. The Chief Clerk was to have temporary charge of the Department, if a vacancy occurred in the Secretaryship; but this provision was improved in 1792 by authorizing the President to name the temporary head of the Department.

That in case of the death, absence from the seat of government, or sickness, of the Secretary of State, Secretary of the treasury, or of the secretary of the war department, or of any officer of either of said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence, or inability by sickness shall cease. (Approved May 8, 1792.)

This was, in its turn, modified in 1795.

That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the department of War, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed or such vacancy be filled: *Provided,* That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months. (Approved, February 13, 1795.)

The President deposited in the several departments all official letters which came to him. Jefferson, after he became President, described the system in a letter to the Secretary of State:

WASHINGTON *Dec. 29. 1801.*

SIR

Having no confidence that the office of the private secretary of the President of the US. will ever be a regular & safe deposit for public papers or that due attention will ever be paid on their transmission from one Secretary or President to another, I have, since I have been in office, sent every paper, which I deem merely public, & coming to my hands, to be deposited in one of the offices of the heads of departments; so that I shall never add a single paper to those now constituting the records of the

President's office; nor, should any accident happen to me, will there be any papers in my possession which ought to go into any public office. I make the selection regularly as I go along, retaining in my own possession only my private papers, or such as, relating to public subjects, were meant still to be personally confidential for myself. Mr. Meredith the late treasurer, in obediance to the law which directs the Treasurer's accounts to be transmitted to & remain with the President, having transmitted his accounts, I send them to you to be deposited for safe keeping in the Domestic branch of the office of the Secretary of State, which I suppose to be the proper one. Accept assurances of my affectionate esteem & high respect.

TH: JEFFERSON

The SECRETARY OF STATE.[6]

Washington made the Department of State the repository of letters to him which often related to business under other Departments, and referred to it all the applications for office he received.[7] The following is an example of the communications sent from the President's office:

The SECRETARY OF STATE.

UNITED STATES *20 Jan: 1792*

By the President's command Tob[s] Lear has the honor to transmit to the Secretary of State the enclosed Letter from Governor Lee, with a Report of a Committee of the General Assembly of Virginia, and a Resolution of that Body respecting certain bounty Lands granted by that State to the Officers & Soldiers of the Virginia Line.

The President requests the Secretary of State to take this matter into consideration and report to him thereon.

TOBIAS LEAR,
S. P. U. S.[8]

As soon as he had organized his administration Washington made an executive council from the heads of the three Departments and the Attorney-General, who had no Department; and when he desired a question submitted to them and could not himself be present at their meeting he directed that they meet at the office of the Secretary of State. Lear wrote to Jefferson in 1793:

[6] Dept. of State MSS., Misc. Letters.

[7] See the Department's publication (1901), Calendar of Applications and Recommendations for Office during the Presidency of George Washington.

[8] Washington Papers, Record Book, Vol. 21.

By the President's command T. Lear has the honor to return to the Secretary of State the draught & copies of letters which he sent to the President this day, — and to inform the Secretary, that the President is so much indisposed that he does not believe he shall be able to meet the Gentlemen at his House tomorrow (the President having had a high fever upon him for 2 or 3 days past, & it still continuing unabated). he therefore requests the attendance of the Heads of the other Departments & the Attorney General at his office tomorrow — and lay before them for their consideration & opinion such matters as he would have wished to have brought to their view if they had met at the President's — & let the President know the result of their deliberations.

The President likewise directs T. Lear to send to the Secretary of State the opinions of the Gentlemen, expressed at their last meeting on the subject of Indian affairs in Georgia, for their signature to-morrow; & to have the blank which is left therein to limit the time of the service of the troops filled up. —

Also a note from the Attorney General relative to certain communications from Baltimore — which the President thinks would be best to lay before the Gentlemen.

TOBIAS LEAR
S. P. U. S.

31st May, 1793 [9]

When Washington left for his Southern tour in 1791 he notified the members of his Cabinet of his itinerary, in order that they might be able to reach him with official communications. They met during his absence and considered public business. The Vice-President presided and the Secretary of State sent reports of the meetings and of such conclusions as had been reached.

Under date of April 17, 1791, Jefferson wrote to the President:

I had the honor of addressing you on the 2nd which I supposed would find you at Richmond, and again on the 10th which I thought would overtake you at Wilmington, the present will probably find you at Charleston.

According to what I mentioned in my letter of the 10th the Vice President, Secretaries of the Treasury and War and myself met on the 11th. Colonel Hamilton presented a letter from Mr. Short in which he mentioned that the month of Feby being one of the periodical months in Amsterdam when from the receipt of interest and refunding of capitals there is much money coming in there, and free to be disposed of, he had put off the opening of his loan till then, that it might fill the more rapidly, a circumstance which would excite the presumption of our credit

[9] Washington Papers, Record Book, Vol. 21.

— that he had every reason to hope it would be filled before it would be possible for him, after his then communication of the conditions, to receive your approbation of them and orders to open a second; which however he awaited, according to his instructions, but he pressed the expediting the order, that the stoppage of the current in our favor might be as short as possible. We saw that if under present circumstances, your orders should be awaited, it would add a month to the delay, and we were satisfied, were you present, you would approve the conditions and order a second loan to be opened — we unanimously therefore advised an immediate order on the condition the terms of the second loan should not be worse than those of the first. — General Knox expressed an apprehension that the 6 nations might be induced to join our enemies * * * [10]

He wrote on May 1, 1791:

* * * I write to day indeed merely as the Watchman cries, to prove himself awake, and that all is well, for the last week has scarcely furnished anything foreign or domestic worthy of your notice * * * [11]

The Secretary of State was the agency for transmitting all commissions to officers appointed by the President other than military officers, who were under the jurisdiction of the War Department, the form being as follows:

To RUFUS PUTNAM, Esquire.

NEW YORK *April 7th 1790.*

SIR

The President of the United States desiring to avail the public of your services as one of the Judges in and over the Territory of the United States North West of the Ohio, I now have the honor of enclosing you the commission, and of expressing to you the sentiments of perfect esteem with which I am, &c [12]

Jefferson consulted his Chief constantly. The following is an example of the notes sent:

Mr. Jefferson has the honour of enclosing for the perusal of the President, rough draughts of the letters he supposes it proper to send to the court of France on the present occasion. He will have that of waiting on him in person immediately to make any changes in them the President

[10] Washington Papers, Record Book, Vol. 20. The full letter may be seen in The Writings of Jefferson (Ford), V, 320.

[11] *Ibid.*

[12] Dept of State MSS., American Letters, Vol. IV.

will be so good as to direct, and to communicate to him two letters just received from Mr Short.

April 5. 1790. a quarter before one.[13]

Little of the business of the Department, even of a routine character, was transacted without the President's sanction.

In a letter dated June 12, 1815, to the Secretary of the Navy, President Madison stated what were the relations of the head of a Department to the President.

By the structure of the several Executive Departments, and by the practice under them, the Secretary of the Navy, like the other Secretaries, is the regular organ of the President for the business belonging to his Department; and with the exception of cases in which independent powers are specially vested in him by law, his official acts derive their authority from, or, in other words, carry with them, the authority of the Executive of the United States. Should a head of a Department at any time violate the intentions of the Executive, it is a question between him and the Executive. In all cases where the contrary does not appear, he is understood to speak and to act with the Executive sanction, or, in other words, the Executive is presumed to speak and to act through him.[14]

The Secretary of State, as the custodian of the seal of the United States and the agency for the promulgation of the laws, occupied a position of higher dignity than attached to the head of any other Department, and a closer relationship to the Chief Executive. His domestic functions were intended to be extensive. "At least," wrote Washington to Jefferson, "it was the opinion of Congress, that, after the division of all the business of a domestic nature between the Departments of the treasury, war, and state, those which would be comprehended in the latter might be performed by the same person, who should have the charge of conducting the department of foreign affairs."[15] Jefferson described the Department as embracing "the whole domestic administration (war and finance excepted)."[16]

In many cases the President was obliged to decide to what Department certain duties belonged. Post-office affairs, for example, Jefferson had supposed would fall under his general supervision. He wrote to Timothy Pickering, the Postmaster-General:

[13] Washington Papers, Record Book, Vol. 21.
[14] Madison MSS., Library of Congress.
[15] Writings (W. C. Ford), V, 139.
[16] Writings (P. L. Ford), II, 468.

PHILADELPHIA *March 28. 1792. Wednesday morning.*

SIR

The President has desired me to confer with you on the proposition I made the other day, of endeavoring to move the posts at the rate of 100 miles a day. It is believed to be practicable here, because it is practized in every other country: the difference of expense, alone, appeared to produce doubts with you on the subject. If you have no engagement for dinner to day, and will do me the favor to come and dine with me, we will be entirely alone, and it will give us time to go over the matter and weigh it thoroughly. I will in that case ask the favor of you to furnish yourself with such notes as may ascertain the present expense of the posts, for one day in the week to Boston, and Richmond, and enable us to calculate the savings which may be made by availing ourselves of the Stages. Be pleased to observe that the stages travel all the day: there seems nothing necessary for us then but to hand the mail along through the night till it may fall in with another stage the next day, if motives of economy should oblige us to be thus attentive to small savings. If a little latitude of expense can be allowed, I should be for only using the Stages the first day, and then have our own riders. I am anxious that the thing should be begun by way of experiment for a short distance, because I believe it will so increase the income of the post office, as to show we may go through with it. I shall hope to see you at three o'clock. I am with great esteem Sir &c.[17]

Washington, however, thought that the post-office properly belonged under the supervision of the Treasury Department. The mint, on the other hand, he placed under the State Department. He wrote to Jefferson October 20, 1792:

The post office (as a branch of Revenue) was annexed to the Treasury in the time of Mr. [Samuel] Osgood [Postmaster-General]; & when Colº Pickering was appointed thereto, he was informed, as appears by my letter to him dated the 29 day of August 1791, that he was to consider it in that light. If from relationship, or usage in similar cases (for I have made no inquiry into the matter, having been closely employed since you mentioned the thing to me in reading papers from the War Office) the mint does not appertain to the Department of the Treasury, I am more inclined to add it to that of state, than to multiply the duties of the other.[18]

Accordingly, the Secretary of State managed the affairs of the mint. December 18, 1792, he wrote:

[17] Dept. of State MSS., American Letters, Vol. IV.

[18] Washington Papers, Record Book, Vol. 21.

The PRESIDENT OF THE UNITED STATES.

Th. Jefferson has the honor to send the President 2 cents made on Voight's plan, by putting a silver plug worth ¾ of a cent, into a copper worth ¼ of a cent. Mr. Rittenhouse is about to make a few by mixing the same plug by fusion with the same quantity of Copper. he will then make of copper alone of the same size, and lastly he will make the real cent as ordered by Congress, four times as big. Specimens of these several ways of making the cent will be delivered to the Committee of Congress now having the subject before them.[19]

When Jefferson entered upon his duties he found two officers of equal rank in charge of the Department's affairs. Henry Remson, Jr., had been elected Under Secretary of Foreign Affairs March 2, 1784, and was given charge of the papers of the Department of Foreign Affairs when the new Government was formed. Roger Alden was elected Deputy Secretary of Congress under Charles Thomson in 1785, and was directed by Washington, when he became President, to take custody of the great seal and other papers of Congress not connected with foreign affairs, finance, or war. Although the law provided for one Chief Clerk, Jefferson determined to leave Remson and Alden in equal rank in the new Department.

When I arrived here [he wrote to Benjamin Smith Barton August 12, 1790], I found Mr. Alden at the head of the home office and Mr. Remson at that of the foreign office. Neither could descend to a secondary appointment, & yet they were each so well acquainted with their respective departments & the papers in them, that it was extremely desirable to keep both. On this ground, of their peculiar familiarity with the papers & proceedings of their respective offices, which made them necessary to me as indexes, I asked permission to appoint two chief clerks. * * * One of them [Alden] chusing afterwards to engage in another line I could do nothing less, in return to the complaisance of the legislature, than declare that as the ground on which alone they were induced to allow the second office, was now removed, I considered the office as at an end, and that the arrangement should return to the order desired by the legislature.[20]

The act of June 4, 1790, gave the authority to employ two principal clerks each at a salary of $800 per annum. On July 25, 1790, Alden resigned to enter private life, being dissatisfied with the com-

[19] Washington Papers, Record Book, Vol. 21.

[20] Writings (Ford), V. 223

pensation of his office,[21] and Remsen then became the Chief Clerk, occupying that position until 1792, when he resigned to become the first teller of the new United States Bank, and his place was taken by George Taylor, of New York, who was promoted from a clerkship in the Department.

The form of appointment was:

Department of State to wit.

George Taylor, heretofore a clerk in the office of the Secretary of State, is hereby appointed a chief clerk thereof in the room of Henry Remsen resigned. Given under my hand this first day of April, 1792.

TH: JEFFERSON.[22]

June 17, 1790, Jefferson sent the Secretary of the Treasury an estimate of the probable expenses of the Department for one year from April 1 last:

	dollars
The Secretary of State, his salary	3500
1st The Home Office	
One Clerk a 800 dollrs and one do a 500 dollrs	1300
Office Keeper and Messenger	200
Stationary	110
Firewood	50
Newspapers from the different States, suppose 15 a 4 dollars	60
A collection of the Laws of the States to be begun, suppose	200
Drenan's account of 1789, August 19th going express ..... 6 dollrs	
Maxwell's Do 10	16
	1836
2d The Foreign Office	
One Clerk a 800 dollrs two Do a 500 dollrs each	1800
The french interpreter	250
Office-Keeper and Messenger	200

[21] In 1822 Alden applied for an office from President Monroe, his personal friend. He stated that he had served in the Revolution in 1777 as aide to General Benedict Arnold; was afterwards a major in the brigade of General Huntington; served under Washington, and in 1780 was selected by him as an aide, but recommended Colonel Humphreys in his place. His last military service was as aide to General Parsons, and he resigned in February, 1781. Afterwards he studied law under Samuel Johnson of Connecticut; was appointed Deputy Secretary of Congress in 1785 and continued in that office until he became a principal clerk in the Department of State. (D. of S. MSS., Applic. for Office.)

[22] Dept. of State MSS., American Letters, Vol. IV.

Rent of the Office	200
Stationary &c	75
Firewood	50
Gazettes from abroad, and do to be sent abroad	25
Contingencies	25
NEW YORK, *June 16th 1790*	2625
[23]	7961

December 11, 1790, he made the estimates for the ensuing year as $8008.50, having combined the home office and foreign affairs. He had one chief clerk at $800 per annum; three clerks at $500 each; "clerk for foreign ianguages," $250; "office rent at Philadelphia $187.50, Ditto at New York, supposing the house there not to be let, or if let, the Rent not recovered for the office is responsible, 150." [24]

One of the clerks, the French translator, it will be observed, received only $250 per annum, but it was not intended that he should devote his whole time to his official duties, as his colleagues did. Other translators were employed for other languages. Isaac Pinto, who was appointed interpreter of the Spanish language November 24, 1786, continued to serve for several years and complained in a letter dated November 13, 1789, that in three years his entire compensation had amounted to only £8.12.4.[25]

To the post of French translator Philip Freneau, "the poet of the Revolution," was appointed August 16, 1791, and while he held it he edited the National Gazette, a newspaper started at the instigation of Jefferson and his friends and the organ of their party.

The clerks were paid out of a general fund, no specific appropriation being made until the act of December 23, 1791, named as the whole amount for the ensuing year for the Secretary and officers $6,300.

The appropriation was meant to include the whole force of the Department, except messengers or laborers, although it spoke of the Secretary "and officers" and did not specify clerks. An act passed

[23] Dept. of State MSS., American Letters, Vol. IV.
[24] Dept. of State MSS., American Letters, Vol. IV.
[25] Dept. of State MSS., American Letters, Vol. IV.

the same year required an oath of office from every clerk and "other officer" in the Departments. Clerks were thus officers. In 1868 Attorney-General Evarts, having the question presented to him by the Secretary of the Treasury, gave an opinion, following that of the Supreme Court,[26] that "clerks in the several executive departments were officers under the government of the United States."[27] In 1896, in response to a request for an opinion by the Secretary of State, the Attorney-General expressed the opinion that all of the officers of the State Department who were below the rank of the Assistant Secretaries were clerks in the meaning of the law.[28] Legally speaking, therefore, not only are clerks officers, but officers are clerks.

The act creating the Department of Foreign Affairs required that the Secretary and each of his subordinates should, before entering upon his duties, take an oath *"well and faithfully to execute the trust committed to him."* This was modified subsequently by the act of March 3, 1791, to require every clerk and "other officer" who had been appointed in any of the Departments and who had not already done so, as well as all who should subsequently be appointed, to take an oath or affirmation before a Justice of the Supreme Court, or a judge of a United States district court, to support the Constitution of the United States as well as to faithfully perform the duties intrusted to him. No regular form of oath was prescribed, but the wording usually ran: "I, A. B., do solemnly swear (or affirm) that I will support the Constitution of the United States and well and faithfully execute the trust confided to me as ————————." Later a new form came into use, the first one of which is found in 1807:

> I John Graham clerk in the Department of State do solemnly swear that I will well and faithfully execute the trust reposed in me according to the best of my skill and Judgement, and particularly that I will make no copies of, or extracts from, any Books or Papers belonging to the said office; but such as I shall be directed or authorized by the Secretary to make nor will I disclose the secrets of the office — I do further swear that I will support the Constitution of the United States and serve them in the

[26] 6 Wall., 393.
[27] 12 Op., 521.
[28] 15 Op., 3.

office which I now hold, under their authority with fidelity and honor, according to the best of my skill and understanding.

JOHN GRAHAM

Sworn this 25th July 1807
before
William Thomton [29]

This form of oath was probably put into effect because there had been in 1800 disclosures of official secrets by two clerks in the office of the Auditor of the Treasury Department,[30] but it does not seem to have remained in use for a long time, the simpler form of an oath of allegiance and to perform faithfully the duties of office being returned to.

The organic act of the Department of State required that the Secretary should provide a Department seal, the President approving the design. The War Department found ready for its use the old seal of the Board of War and Ordnance and the Treasury Department the seal of the Board of Treasury, but the Department of Foreign Affairs had had no seal, so there was no guide for the new Department to follow.

Jefferson had served in 1776 on the first committee chosen by Congress to prepare the design for the arms of the United States; but the device submitted was rejected. He was not, therefore, wholly inexperienced on the subject of official seals; but he does not appear to have made any attempt to make an original one for his Department, and simply chose the arms of the United States. In the inner surrounding circle is the legend: "Department of State United States of America." No record of the precise time of the adoption of the seal is found, but the device has remained without any further change than has arisen from several new seals being cut.

The Department was the medium through which correspondence with the National Government and the several State governments was conducted. How the communications from the States to Congress were to be transmitted was the subject of the following letter from Jefferson to Washington (April 1, 1790):

[29] Dept. of State MSS., Bureau of Appointments.

[30] They were Anthony Campbell and William P. Gardner. See American Historical Review, Vol. III, p. 282.

Th. Jefferson has the honor to inform the President that Mr Madison has just delivered to him the result of his reflections on the question *How shall communications from the several states to Congress through the channel of the President be made?*

He thinks that in no case would it be proper to go by way of *letter from the Secretary of state:* that they should be delivered to the houses either by the Secretary of state in person or by Mr Leir, he supposes a useful division of the office might be made between these two, by employing the one where a matter of fact alone is to be communicated, or a paper delivered in the ordinary course of things and where nothing is required by the President; and using the agency of the other where the President chuses to recommend any measure to the legislature and to attract their attention to it.

The President will be pleased to order in this what he thinks best. T. Jefferson supposes that whatever may be done for the present, the final arrangement of business should be considered as open to alteration hereafter. The government is as yet so young, that cases enough have not occurred to enable a division of them into classes, and the distribution of these classes to the persons whose agency would be the properest.

He sends some letters for the President's perusal, praying him to alter freely anything in them which he thinks may need it.[31]

Under the Confederation the President of Congress always transmitted acts of Congress to the executives of the States, but the Secretary of Foreign Affairs was commonly the medium of correspondence with the governors.[32] The Department of Foreign Affairs took the duty of sending the acts and of other correspondence under the new Government.

Jay wrote to the governors of New York and Massachusetts September 4, 1789:

In pursuance of the Orders of the President of the United States, I have the honor of transmitting to your Excellency herewith enclosed, a copy of an Act of Congress of the 6th June 1788 and of a concurrent Resolution of the Senate and House of Representatives (passed by the latter on the 10th and concurred in by the former on the 19th August last). In pursuance of a request contained in this Resolution, the President has been pleased to appoint Andrew Ellicott to compleat the survey therein mentioned; who will begin that work on the tenth day of October next; and am directed to give your Excellency this information in order that the State of ——— may if they think proper, have persons attending at the time.[33]

[31] Washington Papers, Record Book, Vol. 21; also Jefferson's Writings (Ford), V, 150.

[32] Writings of Madison (Hunt), I, 291.

[33] Dept. of State MSS., American Letters, Vol. IV.

The joint resolution directed the Geographer of the United States to ascertain the boundary line between the United States and the States of New York and Massachusetts, agreeably to the deeds of cessions of those States.

Jefferson continued the practice of Jay.

(Circular)

To the Governors of the several States.

NEW YORK, *March 31st 1790.*

SIR

I have the honor to send you herein enclosed two copies, duly authenticated, of the act providing for the enumeration of the inhabitants of the United States; also of the act to establish an uniform rule of naturalization; also of the act making appropriations for the support of Government for the year 1790; and of being with sentiments of the most perfect respect &c.

THOMAS JEFFERSON.[34]

It was Jefferson's opinion, however, that some of the correspondence with the governors of the States might be carried on directly with the President. He wrote to the President November 6, 1791:

I have the honour to inclose you a draught of a letter to Governor Pinckney, and to observe that I suppose it to be proper that there should, on fit occasions, be a direct correspondence between the President of the U. S. and the governors of the states; and that it will probably be grateful to them to receive from the President answers to the letters they address to him. The correspondence with them on ordinary business may still be kept up by the Secretary of State in his own name.[35]

There was no doubt, however, that the Secretary of State was to be the sole intermediary of correspondence with our agents abroad and the agents of foreign governments to the United States. The rule was laid down before Jefferson's appointment, when Washington declined direct correspondence with Moustier, the French minister.

American representatives continued to serve abroad without in all cases receiving new commissions. Jefferson wrote to Washington February 4, 1792:

[34] Dept. of State MSS., American Letters, Vol. IV.
[35] Washington Papers, Record Book, Vol. 20.

The laws and appointments of the antient Congress were as valid and permanent in their nature, as the laws of the new Congress, or appointments of the new Executive; these laws & appointments in both cases deriving equally their source from the will of the Nation: and when a question arises, whether any particular law or appointment is still in force, we are to examine, not whether it was pronounced by the antient or present organ, but whether it has been at any time revoked by the authority of the Nation expressed by the organ competent at the time. The Nation by the act of their federal convention, established some new principles & some new organizations of the government. This was a valid declaration of their will, and *ipso facto* revoked some laws before passed, and discontinued some offices and officers before appointed. Whenever by this instrument, an old office was superseded by a new one, a new appointment became necessary; but where the new Constitution did not demolish an office, either expressly or virtually, nor the President remove the officer, both the office and the officer remained. This was the case of several; in many of them indeed an excess of caution dictated the superaddition of a new appointment; but where there was no such superaddition, as in the instance of Mr. Dumas, both the office and the officer still remained: for the will of the nation, validly pronounced by the proper organ of the day, had constituted him their agent, and that will has not through any of its successive organs revoked his appointment.[36]

The complete power of the Executive over the transaction of business pertaining to foreign countries is illustrated by —

The opinion of the Secretary of State on the construction of the powers of the Senate with respect to their agency in appointing Ambassadors &c and fixing the grade.

The Constitution having declared that the President "shall *nominate*, and by and with the advice and consent of the Senate, shall *appoint* Ambassadors, other public Ministers and Consuls," the President desires my opinion whether the Senate has a right to negative the *grade* he may think it expedient to use in a foreign mission, as well as the *person* to be appointed?

I think the Senate has no right to negative the *grade*.

The Constitution has divided the powers of Government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy. The Legislative it has given completely to the Senate and House of Representatives: It has declared that the Executive powers shall be vested in the President, submitting only special articles of it to a negative by the Senate: and it has vested the Judiciary power in the Courts of Justice, with certain exceptions also in favor of the Senate.

The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to

[36] Washington Papers, Record Book, Vol. 20. Writings of Jefferson (Ford), V, 438.

such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly. The Constitution itself indeed has taken care to circumscribe this one within very strict limits: for it gives the *nomination* of the foreign Agent to the President — the *appointment* to him and the Senate jointly; and the *commissioning* to the President. This analysis calls our attention to the strict import of each term. To *nominate* must be to *propose; appointment* seems to be the act of the will which constitutes or makes the Agent; and the Commission is the public evidence of it. But there are still other Acts previous to those not specially enumerated in the Constitution; towit 1. the destination of a mission to the particular country where the public service calls for it: and, 2nd. the character, or grade to be employed in it. The natural order of all these is 1. destination. 2nd. grade. 3d nomination. 4th appointment. 5th commission. if *appointment* does not comprehend the neighboring Acts of *nomination* or *commission,* (and the constitution says it shall not, by giving them exclusively to the President) still less can it pretend to comprehend those previous and more remote of *destination* and *grade.* The Constitution analyzing the three last, shews they do not comprehend the two first. The 4th is the only one it submits to the Senate, shaping it into a right to say that "A. or B. is unfit to be appointed, but the grade fixed on is not the fit one to employ" or "our connections with the Country of his destination are not such as to call for any mission." The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department. It was not intended that these should be communicated to them: nor can they therefore be qualified to judge of the necessity which calls for a mission to any particular place or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the President. They are only to see that no unfit person be employed.

It may be objected that the Senate may, by continual negatives on the *person,* do what amounts to a negative on the *grade:* and so indirectly defeat this right of the President. But this would be a breech of trust, an abuse of the power confided to the Senate, of which that body cannot be supposed capable. So the President has a power to convoke the legislature; and the Senate might defeat that power by refusing to come. This equally amounts to a negative on the power of convoking. Yet nobody will say they possess such a negative, or would be capable of usurping it by such oblique means. If the Constitution had meant to give the Senate a negative on the grade or destination, as well as the person, it would have said so in direct terms, and not left it to be effected by a sidewind. It could never mean to give them the use of one power thro' the *abuse* of another.

TH JEFFERSON [37]

New York } 1790
April 24 }

[37] Washington Papers, Record Book, Vol. 20. See also Writings of Jefferson (Ford), V, 161.

The arrangement of compensation for officers in the foreign service was left to the President, but the act of July 1, 1790, limited the whole amount to be expended to $40,000 per annum, and specified the maximum salaries. The President was authorized —

To draw from the treasury of the United States, a sum not exceeding forty thousand dollars, annually, to be paid out of the moneys arising from the duties on imports and tonnage, for the support of such persons as he shall commission to serve the United States in foreign parts, and for the expense incident to the business in which they may be employed. *Provided,* That, exclusive of outfit, which shall, in no case, exceed the amount of one year's full salary to the minister plenipotentiary or charge des affaires, to whom the same may be allowed, the president shall not allow to any minister plenipotentiary a greater sum than at the rate of nine thousand dollars per annum, as a compensation for all his personal services, and other expenses; nor a greater sum for the same, than four thousand five hundred dollars per annum to a charge des affaires; nor a greater sum for the same, than one thousand three hundred and fifty dollars per annum to the secretary of any minister plenipotentiary. *And provided, also,* That the president shall account, specifically, for all such expenditures of the said money as, in his judgment, may be made public, and also for the amount of such expenditures as he may think it adviseable not to specify, and cause a regular statement and account thereof to be laid before congress annually, and also lodged in the proper office of the treasury department.

SECT. 2. *And be it further enacted,* That this act shall continue and be in force for the space of two years thereafter and no longer.

Jefferson submitted the following to the President:

Observations &c respecting Diplomatic Matters, and the allowances made by Congress.

The bill on the intercourse with foreign nations restrains the President from allowing to Ministers Plenipotentiary or to Chargés des Affairs more than 9000 and 4500 dollars for their personal services and other expences. This definition of the objects for which the allowance is provided, appearing vague, the Secretary of State thought it his duty to confer with the Gentlemen heretofore employed as Ministers in Europe, to obtain from them, in aid of his own information, an enumeration of the expences incident to these offices, and their opinion which of them would be included within the fixed salary, and which would be entitled to be charged separately. He therefore asked a conference with the Vice President, who was acquainted with the residences of London and the Hague, and the Chief-Justice who was acquainted with that of Madrid, which took place yesterday.

The Vice President, Chief Justice, & Secretary of State concurred in opinion that the Salaries named by the Act are much below those of the same grade at the Courts of Europe, and less than the public good requires they should be, consequently, that the expences not included within the definition of the law should be allowed as an additional charge.

1. Couriers, gazetts, translating necessary papers, printing necessary papers, aids to poor Americans; all three agreed that these ought to be allowed as additional charges not included within the phrase "his personal services, and other expences." —

2. Postage, Stationary, Court-fees. — One of the Gentlemen being of opinion that the phrase "personal services & other expences," was meant to comprehend all the *ordinary expences* of the office, considered this second class of expences as *ordinary,* and therefore included in the fixed salary the 1″ class before mentioned he had viewed as *extraordinary.* The other two Gentlemen were of opinion this 2ᵈ class was also out of the definition, & might be allowed in addition to the salary — one of them particularly considered the phrase as meaning "personal services personal expences," that is, expences for his personal accommodation, comfort & maintenance. This 2ᵈ class of expences is not within that description.

3. Ceremonies; such as diplomatic and public Dinners, Galas & illuminations. One Gentleman only was of opinion these might be allowed.

The expences of the 1st class may probably amount to about 50 Dollars a year; that of the 2ᵈ to about four or five hundred dollars. Those of the 3ᵈ are so different at different Courts, & so indefinite in all of them that no general estimate can be proposed.

The Secretary of State thought it his duty to lay this information before the President, supposing it might be satisfactory to himself; as well as to the Diplomatic Gentlemen, to leave nothing uncertain as to their allowances; & because too, a previous determination is in some degree necessary to the forming an estimate which may not exceed the whole sum appropriated. Several papers accompany this containing former opinions on this subject.

The Secretary of State has also consulted on the subject of the Morocco consulships, with Mr. Barclay, who furnished him with the note of which a copy accompanies this. Considering all circumstances Mʳ Barclay is of opinion we had better have only one consul there; and that he should be the one now residing at Morocco, because, as Secretary to the Emperor, he sees him every day & possesses his ear. He is of opinion 600 Dollars a year might suffice for him; & that it should be proposed to him, not as a salary, but as a sum in gross intended to cover his expenses, & to save the trouble of keeping accounts; that this Consul should be authorised to appoint Agents in the Seaports, who would be sufficiently paid by the consignments of vessels. He thinks the Consul at Morocco would most conveniently receive his allowance through the channel of our Chargé at Madrid, on whom also this consulate had better be made dependent for

instructions, information & correspondence, because of the daily intercourse between Morocco and Cadiz.

The Secretary of State, on a view of M[r] Barclay's Note, very much doubts the sufficiency of the sum of 600 Dollars; he supposes a little money there may save a great deal; but he is unable to propose any specific augmentation till a view of the whole diplomatic Establishment and its expences, may furnish better grounds for it.

TH: JEFFERSON

17th July, 1790.[38]

In 1792 (November 5) Jefferson made a report on the subject of expenditures as follows:

Estimate of the fund of 40,000 Dol. for foreign intercourse, and its application

	D	D
1790 July 1. to 1791 July 1. a year's appropriation	40,000	
1791 July 1, to 1792 July 1 do	40,000	
1792 July 1, to 1793 Mar. 3 being $8\frac{1}{10}$ months	27,000	
		107,000
1790. July 1. to 1791. July 1, actual expenses incurred	21,054	
1791. July 1. to 1792 July 1. do	43,431.09	
1792. July 1. to 1793. Mar. 3. the probable expenses may be abt.	26,300	
Surplus unexpended will be about	16,214.91	
		107,000

He estimated the ordinary expenses of the different grades of diplomatic missions as follows (dated November 5, 1792):

Estimate of the ordinary expence of the different diplomatic grades, annually.

A Minister Plenipotentiary

	D
Outfit $\frac{1}{7}$ of 9,000	1285.71
Salary	9000.
Secretary	1350.
Extras	350.
Return $\frac{1}{7}$ of 2250	321.42
	12307.13

[38] Washington Papers, Record Book, Vol. 20.

A Resident

	D
Outfit ¼ of 4500	642.85
Salary	4500.
Extras	350.
Return ¼ of 1125	160.71
	5653.56

Agent

	D
Salary	1300
Extras	350
	1650

Medals to foreign ministers, suppose 5. to be kept here & to be changed once in 7. years will be about 654.6 annually

To support the present establishment would require

	D
for Paris, Minister Plenipoty	12,307.13
London do	12,307.13
Madrid Resident	5,653.56
Lisbon do	5,653.56
Hague do	5,653.56
Medals to foreign ministers	654.6
	42,229.54

A reduction of the establishment, to bring it within

	D
the limits of 40,000.	
for Paris, a Minister Plenipty	12,307.13
London do	12,307.13
Madrid, a Resident	5,653.56
Lisbon, do	5,653.56
Hague, an agent	1,650.
Medals to for. ministers	654.6
Surplus	1,774.02
	40,000.

He also made the following:

Estimate of Demands on the Foreign Fund from July 1st, 1790, to March 4, 1793.

	1790–1.	1791–2.	1792–3. 8 months.
France....Salary	4,500	6,000	6,000
Secretary of chargé des affaires during his absence in Holland. — Suppose 4 months ab^{t}....	243	1,350	900
His expenses on that journey ab^{t}	675		
Gazettes, postage & other extras ab^{t}	350	350	240
Outfit to Minister Plenipo		9,000	
England. Special Agent, viz:			
Mr. Gouverneur Morris from 1790, Mar. 24 to Sept. 24	2,000		
Minister-Plenipo: his outfit		9,000	
His salary, suppose from March 1st, 1792		3,000	6,000
Extras		80	240
His Secretary, suppose from March 1st, 1792		450	900
Spain. Chargé des affaires:			
His salary	4,500	4,500	3,000
Extras	350	350	240
Additional Commissioner, his traveling and tavern expenses. Conjecture		1,500	
Portugal. Minister Resident:			
His outfit	4,500		
Salary from Feb^{y} 21st to July 1st	1,625	4,500	3,000
Extras	126	350	240
Hague. Agent: his salary	1,300	1,300	866
Extras	100	100	66
Minister Resident: his outfit		4,500	
Salary, suppose from March 1st, 1792		1,500	3,000
Extras		80	240
Col^{o} Humphrey's Agency from Aug^{t} 11, 1790 to Feb^{y}. 21, 1791, a 2250 Dol^{s} p^{r} Ann.	1187.5		
Extras	185.		
Foreign Ministers taking leave. Medals.			
Luzerne about 1062.5			
Von Berkel 697.			
Du Moustier 555.5	2,315		
	23,956.5	47,910	24,932
Total			96,798.5
The Foreign Fund a 40,000 Dolls p. ann. from July 1st. 1791 to Mar. 4, 1793			106,666⅔
Balance will remain to guard against contingencies.			[39]9,868.1

This question is further elucidated by the following (dated April 18, 1793):

[39] Washington Papers, Record Book, Vol. 21.

The Secretary of State thinking it his duty to communicate to the President his proceedings of the present year for transferring to Europe the annual fund of 40,000 Dollars appropriated to the department of State (a report whereof was unnecessary the two former years, as monies already in the hands of our bankers in Europe were put under his orders)

Reports

That in consequence of the President's order of Mar. 23. he received from the Secretary of the Treasury Mar. 31. a warrant on the Treasury for 39,500 Dollars: that it being necessary to purchase private bills of exchange to transfer the money to Europe, he consulted with persons acquainted with that business, who advised him not to let it be known that he was to purchase bills at all, as it would raise the exchange, and to defer the purchase a few days till the British packet should be gone, on which went bills generally sunk some few percent. He therefore deferred the purchase, or giving any orders for it till Apr. 10, when he engaged Mr. Vaughan (whose line of business enabled him to do it without suspicion) to make the purchase for him: he then delivered the warrant to the Treasurer, & received a credit at the Bank of the U. S. for 39,500 D. whereon he had an account opened between "The Department of State & the Bank of the U S." That Mr. Vaughan procured for him the next day the following bills..

	£ Sterl		Doll
Willing, Morris & Swanwick on John & Francis Baring & Co. London	3000-	for	13,000
Walter Stewart on Joseph Birch—merch[t] Liverpool	400-0	=	1,733.33
Robert Gilmer & Co. on James Strachan & James Mackenzie, London, indorsed by Mordecai Lewis £ 200, 150, 250	600-0	=	2,600
	4000-0	=	17,333.33

averaging 4^{s}–$7\ \frac{55}{100}{}^{d}$ the dollar, or about 2½ per cent above par, which added to the 1. per cent loss heretofore always sustained on the government bills (which allowed but 99 florins, instead of 100 do. for every 40. dollars) will render the fund somewhat larger this year than heretofore: that these bills being drawn on London (for none could be got on Amsterdam but to considerable loss, added to the risk of the present possible situation of that place) he had them made payable to Mr. Pinckney, and inclosed them to him by Capt. Cutting, in the letter of Apr. 12 now communicated to the President, and at the same time wrote the letter of the same date to our bankers at Amsterdam & to Col[o] Humphreys, now also communicated to the President, which will place under his view the footing on which this business is put, and which is still subject to any change he may think proper to direct, as neither the letters nor bills are yet gone.

The Secretary of state proposes hereafter to remit in the course of each quarter, 10,000 D. for the ensuing quarter, as that will enable him to take advantage of the times when exchange is low. He proposes to direct at this time a further purchase of 12,166.66 D. (which with the 500 D. formerly obtained & 17,333.33 now remitted, will make 30,000 D of this year's fund) at long sight, which circumstance with the present low rate of exchange will enable him to remit it to advantage.

He has only further to add that he delivered to Mr. Vaughan orders on the bank of the U S. in favor of the persons themselves from whom the bills were purchased for their respective sums.

This act of 1790 was continued in force in subsequent years, with additional appropriations for specific purposes of foreign intercourse, and the act of May 1, 1810, included consuls to Algiers and other states on the coast of Barbary, the salary being limited to $4,000 for the consul at Algiers and $2,000 for those at other states on the Barbary coast; but they were to have no payments whatever for outfits. By this act, also, the President was authorized to make foreign appointments during the recess of the Senate, to " be submitted to the Senate at the next session thereafter, for their advice and consent."

Other consuls were not, at this time, in receipt of regular salaries, their payment coming from the fees of office which they were allowed to collect.

It was the practice of the Secretary of State to make recommendations to the President for consular appointments. The applicants were not many and were usually from merchants resident in the ports. February 23, 1791, in sending a list of applicants, Jefferson recommended that a vice-consul be nominated in this form:

John Culnan, citizen of the U. S. late of its armies, and now a merchant at Teneriffe, to be vice consul of the U. S. for the Canary Islands.

For a consul:

James Yard, of Pennsylvania, to be Consul for the U. S. in the Island of Santa Cruz, and such other parts within the allegiance of his Danish Majesty as shall be nearer thereto than to the residence of any other Consul, or Vice Consul of the U. S. within the same allegiance.[40]

GAILLARD HUNT.

[The next section will be Sometime and Occasional Duties of the Department of State.]

[40] Washington Papers, Record Book, Vol. 20.

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THE SUCCESSION IN CHINA

During the month of November last a series of important events occurred in the great Empire of China. After a nominal reign of thirty-four years, the Emperor Kwang Hsu died on November 13, and the next day the Empress Dowager Tsi Hsi also died. A considerable part of Kwang Hsu's reign was under a regency, and during his majority he was in poor health. Hence, he depended to a great degree upon the assistance and advice of his aunt, the Dowager Empress, in directing the government of the Empire.

Tsi Hsi was one of the most masterful female rulers of all history. She was the secondary wife of the Emperor Hsien Feng, who died in 1861. She bore him a son, who became Emperor, reigning from 1862 to 1875, and died without issue. The Empress Dowager thereupon caused to be chosen as ruler Kwang Hsu, son of her sister and of Prince

Chun, brother of the Emperor deceased in 1861. This brief sketch of her relation to the Throne shows that Tsi Hsi has been practically the ruler of China for the past half century.

It has been an eventful reign, seldom equaled in the long history of that ancient people. She fled with her husband from Peking in 1860, on the approach of the allied British and French armies, and witnessed his demise from a broken heart over the humiliation of his country. Under her administration the Tai Ping rebellion came to an end, the formidable Mohammedan revolt of ten years later was suppressed, as well as numerous minor movements for the overthrow of the Manchu dynasty, the Empress Dowager showing a courage and skill equal to that of Catharine of Russia. Although the foreign wars and encroachments gave her much anxiety, she met them with a heroic devotion which won the confidence of her statesmen and people.

The recent reforms in the Empire which have so greatly attracted the attention of the outside world, if not directly inspired by her, have been decreed under her authority, and it is understood she heartily entered upon their enforcement. The summons to Peking of Chang Chi-tung and Yuan Shi-kai, the two most powerful and advanced men of the Empire, that she might have them near the Imperial Palace in her last days, was an indication of the spirit which animated her. It was after their arrival that the memorable edict was issued on the 27th of August last proclaiming the intention of the Throne to give a constitution to the country within nine years.

Before his death, Kwang Hsu, with the approval of the Empress Dowager, chose Prince Chun as Regent of the Empire, and named the latter's son, Pu Yi, an infant of three years, to succeed him as Emperor. This act was in accordance with the laws and usages of the Manchu dynasty. There is no heir apparent in China. The reigning sovereign has the right to select before his death or in his will any one of his sons as his successor, and, in default of sons, one of his near kinsmen of the imperial family. Prince Chun, the recently designated Regent, is a younger brother of the late Emperor, two other brothers being still alive. Such a selection is not unusual. The famous Emperor Chien Lung, who died in 1795, after a sixty years' reign, had seventeen sons, and chose the fifteenth son as his successor. Tao Kuang, deceased in 1850, had nine sons and selected the fourth as Emperor.

The name or style of reign selected for the infant Emperor is Hsuan Tung. The cabinet, or grand council, which will advise the Regent

Prince Chun, consists of the following five eminent persons: Prince Ching, a member of the imperial family, president of the Wai Wu-pu, or foreign office; Hsi Suh, a Manchu and a grand secretary; the Viceroy Chang Chi-tung; Lu Chuan-Lin, late viceroy of Szechuan; and Yuan Shi-kai, Minister of Foreign Affairs. The cabinet usually consists of an equal number of Manchu and Chinese members. A vacancy exists by the promotion of Prince Chun to be Regent. These important changes in the state have taken place without any disturbance of the public order or any manifestation of discontent, which augurs well for the country and the Emperor. The Regent has the advantage over all of the preceding rulers of the Empire that he is acquainted with foreign lands, having made a journey to Europe a few years ago, accompanied by Sir Chentung Liang Cheng, late minister to the United States. The liberal and progressive views of the new Regent seem to be shown in his prompt recognition of the recent reform measures of the late Emperor, and especially in his edict declaring his intention to carry forward the preparation for the promised constitution.

In the issue of the JOURNAL for January last a full history was given of the Chinese indemnity and of the action of Congress, in authorizing the remission of about one-half of the amount to which the United States was entitled under the protocol of the powers. Since that date the Chinese Government has been officially advised of the action of the Government of the United States, and in manifestation of the gratitude of the Chinese Government and people a special embassy was sent to Washington to convey to the President their appreciation of his justice and magnanimity. This embassy arrived in December and has delivered to President Roosevelt the thanks of the Emperor.

In addition to this gracious act, the Chinese Government has given notice that it will send to the United States a considerable number of specially selected young Chinese, during the next twenty-five years, to be educated in its schools and colleges. The expenditure for these young men it is estimated will amount to the full sum of the remitted indemnity.

The Special Ambassador Tang Shao-yi, who is at the head of this embassy, is one of the notable men of the Chinese Government. He was educated in the United States about twenty-five years ago, has a perfect knowledge of English, and is fairly well versed in American institutions. His early service for his Government was in Korea as secretary to Yuan Shi-kai, the Chinese resident of that country while still a quasi depend-

ency of China. Other of his diplomatic labors were in the negotiation at Calcutta of the Tibetan convention with Great Britain, and the settlement of Manchurian questions at Peking with Baron Hayashi, the Japanese envoy. Until recently he was junior vice-president of the Wai Wu-pu and controller-general of customs, which posts he relinquished to assume the important and delicate duties of governor at Mukden.

It will commend Tang Yao-yi to the friends of humanity to state that he has been the most active leader in the antiopium crusade. It was his activity which in large degree brought about, under the leadership of Secretary Root, the antiopium international conference at Shanghai.

ARBITRATION TREATY WITH CHINA

October 8, 1908

The United States has made the maintenance of the territorial integrity of China a cardinal part of its foreign policy, not because the United States desires to preserve China as a field for political expansion or commercial development, but because our Government admits the right of China to independence and seeks by all possible and appropriate means to aid the Chinese to realize in the fullest measure the destiny marked out for it in Asia. It is unnecessary to set forth the steps by which China has been opened to the world and the great and honorable part taken by the United States in the movement, as this subject has been carefully considered in a previous issue of the JOURNAL.[1]

The result is that China is not only opened to the world, but the great powers which may be supposed to cherish designs against the integrity of China or to obtain exclusive privileges have one by one accepted the American policy as formulated by Secretary Hay and declared in formal and express terms their intention to maintain the integrity of China and the equal opportunity of all nations in the industrial and commercial development of the great Empire.[2]

The United States has not only maintained the principle of Chinese territorial integrity and equal commercial opportunity, but has concluded a treaty of arbitration with China, thereby recognizing its equality and its claim to a like treatment with other nations. The United States on October 8, 1908, signed a treaty of arbitration with China in accordance with the provisions of article 19 of the convention for the pacific

[1] See editorial on "The Integrity of China and the Open Door," 1, 954–63.

[2] For the successive steps in the negotiation up to and including the year 1907, see the editorial above referred to.

settlement of international disputes, concluded at The Hague, July 29, 1899, by which the signatory powers reserved the right of concluding agreements with a view to referring to arbitration all questions they should consider possible to submit to arbitration.

As in the various treaties to which the United States is a party, the conventional obligation to arbitrate is limited to a period of five years from the date of the exchange of ratifications (article 3). It has been said that the United States recognizes the equality of China; the truth of that statement is evident from the wording of article 1, which follows:

> Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.

It is to be noted that the contracting parties bind themselves to submit questions of a legal nature, or differences relating to the interpretation of treaties existing between them. It will be observed that the agreement to arbitrate is thus general and express, for difficulties concerning extraterritoriality are not excluded. In the draft convention of compulsory arbitration submitted to the first commission at the Second Hague Conference in 1907 extraterritorial rights and privileges were expressly excluded, but upon motion of China and the other nations in which extraterritoriality obtains, seconded by the United States, Germany, and Russia, the provision was stricken from the draft, notwithstanding the opposition of Great Britain. It may well be that extraterritoriality is a political question and, as far as it is not guaranteed by special treaties, may be excluded from the operation of the convention. And it may be also that the term "vital interests" is elastic enough to embrace extraterritoriality and thus exclude controversies involving extraterritorial rights and privileges from the treaty. It is a fact, however, that these rights and privileges are not specifically exempted and China is rightly and properly treated on a plane of equality with the other members of the family of nations.

The second article fixes the arbitral procedure, specifying the "special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure." The final

sentence of the article is national rather than international, for it deals with the internal organ of the United States by which this special agreement is to be framed: "It is understood that such special agreements will be made on the part of the United States by the President of the United States by and with the advice and consent of the Senate thereof."

UNITED STATES AND JAPAN IN THE FAR EAST

Ever since the unfortunate controversy between the United States and Japan concerning the alleged exclusion of Japanese subjects from public schools in San Francisco, the radical press of both countries has teemed with war and rumors of wars. The surest way to bring about war is to discuss its possibility, for the latent patriotism is fanned into flame; statesmen dependent upon popular support for continuance in office feel themselves obliged to satisfy public opinion and prepare in advance to meet an eventuality, however distressing or improbable it may be. The army is increased or reorganized to meet an imaginary evil, and the navy is overhauled and enlarged to prevent the predicted invasion. In such an atmosphere the slightest incident which otherwise would pass unnoticed assumes international importance and significance. An insult to national honor is discovered which does not exist, just as we find in times of controversy a hidden meaning lurking in an otherwise harmless and ordinary statement.

Japan and the United States are to be congratulated in that they have removed by a frank and formal expression of their views any doubt as to their pacific intentions.

The notes exchanged November 30, 1908, by Ambassador Takahira on behalf of Japan and Secretary Root on behalf of the United States are so clear in themselves as to need neither comment nor explanation. They are therefore printed *in extenso:*

NOVEMBER 30, 1908.

SIR: The exchange of views between us, which has taken place at the several interviews which I have recently had the honor of holding with you, has shown that Japan and the United States holding important outlying insular possessions in the region of the Pacific Ocean, the Governments of the two countries are animated by a common aim, policy, and intention in that region.

Believing that a frank avowal of that aim, policy, and intention would not only tend to strengthen the relations of friendship and good neighborhood, which have immemorially existed between Japan and the United States, but would materially contribute to the preservation of the general peace, the Imperial Government

have authorized me to present to you an outline of their understanding of that common aim, policy, and intention:

1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interest of all powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.

5. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

If the foregoing outline accords with the view of the Government of the United States, I shall be gratified to receive your confirmation.

I take this opportunity to renew to Your Excellency the assurance of my highest consideration.

K. TAKAHIRA.

Honorable ELIHU ROOT,
Secretary of State.

November 30, 1908.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of to-day setting forth the result of the exchange of views between us in our recent interviews defining the understanding of the two Governments in regard to their policy in the region of the Pacific Ocean.

It is a pleasure to inform you that this expression of mutual understanding is welcome to the Government of the United States as appropriate to the happy relations of the two countries and as the occasion for a concise mutual affirmation of that accordant policy respecting the Far East which the two Governments have so frequently declared in the past.

I am happy to be able to confirm to Your Excellency, on behalf of the United States, the declaration of the two Governments embodied in the following words:

1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interests of all powers in

China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.

3. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

Accept, Excellency, the renewed assurance of my highest consideration.

ELIHU ROOT.

His Excellency,
BARON KOGORO TAKAHIRA,
Japanese Ambassador.

ENGLAND AND RUSSIA IN CENTRAL ASIA

During the last century the Russian and English frontiers in Central Asia slowly but steadily approached until in the last decade their advance guards stood angrily face to face on the "roof of the world" at the western extremity of the Chinese Empire. Happily, in 1895 the Pamir boundary commission reached an amicable agreement, awarding Pamir to Russia and a northwestward extension of Kashmir to England, with a strip between them barely fourteen miles in minimum width left to Afghanistan. This established a buffer for a few miles, but there remained between the advancing frontiers throughout their vast extent the disorderly governments of Persia, Afghanistan, and Tibet, offering opportunity for new encroachments. Mutual suspicion between the peoples of the two countries made such encroachments by their governments almost unavoidable. Every movement by the one, no matter how innocent, was interpreted by the other as an act of hostility. Consular and commercial agents of the two vied with each other in extending their respective influence by securing mining, railroad, telegraph, telephone, and other franchises.

The vague unrest and political agitation in these three decadent countries, due to the infiltration of western ideas, increased the probability of appeals to and interference from the two interested European powers. The liberal factions naturally looked toward England; the reactionaries, toward Russia. In July of 1906 a demonstration of students and ecclesiastics at Teheran, the Persian capital, seconded by the discontented, oppressed, and distressed masses, extracted from the old Shah a promise of a constitutional government. Three months later an elected assembly convened. The death of the Shah a few weeks afterward introduced a

period of uncertainty. The new Shah is a reactionary, but for many months he was too timid to assert himself. Before the middle of the year 1907 revolutionary violence had spread over nearly the entire Empire. The mercenary rule of the despotic satraps, which the corrupt absolutism had fastened on the provinces, everywhere broke down.

In the midst of these disorders, trouble arose with Turkey over the uncertain boundary. The savage Kurds occupying the disputed strip, several miles in width and several hundred in length, claim allegiance to either of the powers as it suits their convenience to escape punishment at the hands of the other. In 1904 they had murdered an American missionary on Persian territory. The Government at Washington demanded of Persia condign punishment of the offenders. The Shah's Government pleaded inability to apprehend. It seemed but an excuse for inaction. For three years the case pended. Finally, in July, 1907, a disorderly semiofficial Persian punitive expedition raided the disputed strip to punish the Kurds for this and other offenses. It was met and scattered by a Turkish army. Pressure from the American, British, and Russian ambassadors at Constantinople alone prevented the Porte from invading Persia in retaliation for this pretended violation of Turkish territory at a time when Persia was wholly unable to defend her claim or prevent a still further extension of the Turkish frontier.

At about the same time the long negotiations between St. Petersburg and London regarding the buffer states in Central Asia reached a happy conclusion in the Anglo-Russian convention. It was signed August 18/31, 1907, and ratified a few weeks later. According to it the two Governments agree to respect the integrity and independence of Persia, but divide that country into spheres of influence; in Afghanistan British influence is recognized as paramount and Russia will have no dealings with that Government except through the British, the latter agreeing not to interfere with the internal government or territory of the Amir; both Powers recognize the suzerainty of China over Tibet, engage to respect its territorial integrity, and agree not to treat with it except through China.[1]

When the British Parliament assembled in February, 1908, Sir Edward Grey successfully defended the convention. Certain discontented elements within and a considerable following without held that it had been purchased by too great sacrifices; that its terms were ambigu-

[1] For a discussion and analysis of the convention, see the issue of this JOURNAL for October, 1907; and for the text, see the Supplement to that number.

ous and its value uncertain; that the entire omission of British interests in the Persian Gulf was deplorable. Lord Grey admitted that it contained ambiguities, but declared that if they had waited to eliminate all no conclusion would have been reached. Much the larger and by far the richer portion of Persia had been recognized as within the Russian sphere; this, however, but recognized a fact already accomplished, Russia having actually acquired much more extensive commercial and political influence in the Empire than Great Britain. Although the British sphere was small, yet it included all that was necessary for strategic purposes. The Indian frontier was safe. In Afghanistan nothing is changed except that Russian invasion, commercial as well as military, is made impossible without a breach of treaty. Neither Power lost anything important in Tibet, nor gained anything except security against aggression from the other. The Persian Gulf was not included because it did not touch the frontier of either. The paramountcy of British interests there had been declared by the one and recognized by the other during the negotiations and by a note attached to the convention, virtually made a part of it. The silent but intense and continuous struggle between England and Russia for influence in these three States which had been in progress since the Crimean war, and had caused great anxiety and expense, was ended. Future hostility concerning them was made impossible without a breach of treaty. The existing revolutionary struggle in Persia between the liberal and reactionary elements was almost sure to result in an appeal to one or the other of the Governments and would very likely have resulted in a war for supremacy. A very gratifying element of the situation in England is that the responsible leaders of both parties in both Houses of Parliament are agreed on supporting the convention.

Popular sentiment in both countries, with some little hesitation, accepted the convention and there has been a notable increase in cordiality and friendly intercourse between the two peoples. This was at the same time typified and strengthened by a visit of King Edward to the Czar in the Gulf of Finland in June. The most cordial sentiments were exchanged between the two sovereigns. With a few exceptions the press of both countries commented favorably. The meeting did much to dispel the old feeling that Russia and England were natural enemies.

Meanwhile, events in Persia were proving, even beyond the hopes of the most sanguine, the great value of the *entente*. Revolutionary disorder continued throughout the country. The Shah's opposition to the

Mejliss, or Parliament, became more and more evident. Finally, in December of 1907 a crisis occurred. The Shah refused to dismiss the reactionary advisers who were intriguing against the Cabinet. The Ministry resigned. The Premier and several others were arrested. The deputies in the Mejliss demanded their release. Fighting broke out in the streets, between the constitutionalists and the royalists. The former appealed to the European legations. The British minister demanded the release of the Premier, who had been educated in an English university. He was allowed to depart quietly for Europe. Violent opposition to the Government continued. After a few days, the Shah, fearing a general revolt, once more took the oath to the constitution.

Had it not been for the Anglo-Russian agreement the military faction in Russia, supported by the reactionary court clique, would probably have forced the Czar's Government to interfere on behalf of absolute monarchy. In that event the English military agitators at home and in India, in response to appeals from Persian liberals, would have urged the occupation of the southern part of the country. A conflict would have been all but inevitable.

The parliamentary victory of December had the unhappy effect of making the Mejliss overestimate its power. For several months it remained triumphant. Late in May of last year a group of discarded courtiers decided to demand the dismissal of the existing palace clique. The Mejliss seconded their demand. The Shah yielded, ostensibly, at least, and announced their dismissal on June 2. Two days later he suddenly sallied forth from the palace attended by a military escort and surrounded by the six presumably dismissed courtiers. A royalist camp was formed outside the city and rapidly grew in size. On June 16 the president of the Mejliss, attended by a committee of six, attempted to read a memorial to the Shah. The latter snatched the document, grasped the hilt of his sword, and bade them remember that his predecessors had won their power over Persia by the sword and he would maintain it by the same means if need be.

The ruling Khajar dynasty, as well as the dominant faction throughout the country, are really foreign, being descended from the Mongolian Turks who conquered the country some five or six centuries ago. The subject majority are, in the main, of the original Persian Aryan stock. The dynasty and its adherents have lost both ability and popularity.

A week after the Shah's indignant reception of the Mejliss committee royalist troops surrounded their meeting place. Many liberal leaders

were seized and summarily hanged or shot. Workmen were engaged and the building was razed to the ground. Regulations were promulgated for the election of a new Mejliss to meet within three months. There was probably no intention of keeping the promise. Reactionary administrators were sent to all the provinces to reestablish the absolute régime. Revolutionary activity was resumed in various parts of the country. It was especially active in the northwest about Tabriz, the second city in importance and the chief commercial center. This has been the hotbed of constitutionalism since the movement began. For nearly three months after the *coup d'état* there was little change. The Shah was triumphant. The constitutionalists were cowed.

During this second crisis Great Britain and Russia, both faithful to the agreement, kept aloof, save for the expression of absolutist sympathies by certain insubordinate semiofficial Russian agents not yet in touch with the new policy under the convention.

In September it yielded its first positive results. An identical note presented by the British and Russian legations urgently recommended that the Shah redeem his promise and call an election for a new Mejliss, since the three months were nearly expired. Late in the month the Shah replied, refusing to renew the constitution until the revolution in the northwest, which was becoming more and more menacing, should be subdued.

In response to new admonitions from Russia and England, the reactionary Ministry replied in November that the Shah personally had constitutional tendencies, but that the nation was anticonstitutional. A few days later came the startling declaration that the constitution was entirely abolished, on the ground that it was contrary to the laws of Islam. The British and Russian legations immediately protested against the proclamation. The Shah weakened and ordered it to be withdrawn and all copies destroyed. On December 1 the Persian Minister for Foreign Affairs intimated to the British and Russian ministers that the Shah was willing to concede a new Mejliss. But the next day the suppressed rescript abolishing the constitution was again published. A new, strong joint note from the two legations again induced the Shah to order the rescript withdrawn.

In the meantime, fighting continued between the constitutionalists and royalists in Tabriz and the surrounding province of Azerbaijan. The British consulate at Tabriz attempted to mediate. The Shah refused to promise immunity to the deputies to the next Mejliss, or amnesty to

revolutionaries. Finally, about the middle of last month it was announced that the long-threatened declaration of independence had been issued. A revolutionary republic had been set up composed of the province of Azerbaijan. The populace is rallying to its support. It is expected that other provinces will follow its example.

So far, Russia and Great Britain remain faithful to the convention and preserve a neutrality, which it seems would not have been possible had not diplomacy scored its triumph just in the nick of time.

RECALL OF MINISTERS

The recall of American diplomatic agents is a subject which has been occupying public attention recently. The practice under our Government has been to recall most of the heads of missions when the administration changes, and such a recall has no reference to the character of the services which have been rendered the Government. When the administration passes from one political party to another the changes in the service are sweeping; but when the new administration is of the same political complexion as the old a few heads of missions and many secretaries remain undisturbed. American diplomatic agents are not appointed for a specified term of office, but it is the custom for ambassadors and ministers to place their resignations in the hands of a new President soon after his inauguration. Subordinate diplomatic officers usually wait to be requested to do so before resigning. During recent years a number of secretaries have been promoted to be heads of missions, and, having performed longer diplomatic service than usually falls to the lot of American diplomatic representatives, they may with reason suppose that they have some equitable claim to continuance in the service. Whether the claim will be recognized is a question which will be answered in a few months. In law all members of the diplomatic service have their tenure of office at the pleasure of the President.

Back of the practice of recalling diplomatic agents, when an administration changes, lies the theory, often advanced to support it, that by long residence in a foreign country the agent becomes attached to it and grows lukewarm toward the interests of his own country, and that a more zealous representative is, therefore, to be found in one who comes fresh from the body of the people. In some quarters, also, there is a prejudice — which is, however, diminishing — against the trained diplomat, in the belief that the training has been chiefly in the hollow trivial-

ities of life and has tended to unfit him for solid usefulness. John Adams used to say that militia diplomats often accomplished more than regulars, and Thomas Jefferson, when he was President, laid down the rule that no head of mission should be permitted to serve for more than eight years. The principles involved in these two announcements still survive in America.

THE CASABLANCA INCIDENT AND ITS REFERENCE TO ARBITRATION AT THE HAGUE

The controversy which for a time troubled the foreign offices of France and Germany, caused by the desertion and arrest on September 25, 1908, of six foreigners from the French foreign legion in Morocco, and the alleged improper assistance furnished them by the German consul, is to be submitted to arbitration at The Hague. The tribunal shall find the facts, apply the law, and determine the situation of the individuals arrested. The submission to arbitration prepared by Messrs. Renault and Kriege, jurisconsults of the French and German foreign offices, was concluded November 24, 1908. The text of this important document, which, it is hoped, will be not merely a model but a precedent for the pacific settlement of international controversies, follows:

The Government of the French Republic and the Imperial German Government having agreed, November 10, 1908, to submit to arbitration all the questions raised by the events which occurred at Casablanca, September the 25th, last, the undersigned, thereunto duly authorized, have agreed upon the following *compromis:*

ARTICLE 1. An arbitral tribunal, constituted as hereinafter stated, is empowered to decide the questions of law and fact brought up by the events which occurred between the agents of the two countries at Casablanca, September 25 last.

ART. 2. The arbitral tribunal shall be composed of five arbitrators, chosen from among the members of the permanent court of arbitration at The Hague.

Each Government, as soon as possible and within a period not to exceed fifteen days from the date of the present *compromis*, shall choose two arbitrators of whom one may be its national. The four arbitrators thus chosen shall select an umpire within fifteen days from the date they are notified of their designation.

ART. 3. The 1st of February, 1909, each party shall furnish the bureau of the permanent court with eighteen copies of its *mémoire*, with certified copies of all papers and documents which it intends to bring up in the case. The bureau shall insure their transmission without delay to the arbitrators and parties, that is, two copies for each arbitrator, three copies for each party. Two copies shall remain in the archives of the bureau.

The 1st of April, 1909, the parties shall deposit in the same way their *contre-mémoires* (replies), with the evidence and their final conclusions.

ART. 4. Each party must deposit in the international bureau, at the latest on April 15, 1909, the sum of 8,000 Netherland florins, as an advance on the expenses of litigation.

ART. 5. The tribunal shall meet at The Hague the 1st of May, 1909, and shall immediately proceed to examine the question.

It shall have the power temporarily to proceed, or to delegate one or several of its members to proceed, to such place as seems necessary for the purpose of securing information under the conditions of article 20 of the convention of October 18, 1907, for the pacific settlement of international disputes.

ART. 6. The parties may use the French or German languages.

The members of the tribunal may use, as they choose, the French or German languages. The decisions of the tribunal shall be published in both languages.

ART. 7. Each party shall be represented by a special agent to serve as intermediary between it and the tribunal. These agents shall give explanations as demanded of them by the tribunal and shall present whatever methods they judge useful for the defense of their cause.

ART. 8. As to matters not provided for in the present *compromis*, the provisions of the aforesaid convention of October 18, 1907, which has not yet been ratified, but which has been signed by both France and Germany, shall be applicable to the present arbitration.

ART. 9. After the arbitral tribunal has decided the questions of law and fact which are submitted to it, it shall determine the situation of the individuals arrested September 25 last, in regard to which there is a dispute.

Done in duplicate at Berlin, November 24, 1908.

The tribunal has been selected and will be formed as follows: For Germany, Dr. Kriege and Mr. Fusinato; for France, Professor Louis Renault and Sir Edward Fry. These four have chosen as the fifth member and president of the tribunal, the Swedish diplomat, Knut Hjalmar von Hammarskjold. The tribunal as constituted is admirable in every respect, for although Messrs. Renault and Kriege are naturally prejudiced in favor of the interests of their countries they are jurists in the highest sense of the word, and may be relied upon to apply impartially a principle of law to the facts found. Mr. Fusinato is professor of international law, a member of the Institute, formerly minister of public instruction, and a very prominent figure at the Second Hague Conference. Sir Edward Fry was for many years a worthy and distinguished lord justice of England, experienced with international arbitration by having acted as judge of the Hague Court and having been connected with the international commission of inquiry. He was present at the Second Hague Conference and worthily represented his country.

He is a jurist by education and instinct. The same may be said of Mr. Hammarskjold, who has held high judicial position in Sweden, and was one time minister of justice in the cabinet.

If the tribunal be regarded as an international commission of inquiry it is to be noted that the contracting Powers agree to have the facts in controversy found as well as the question of responsibility, thereby following the example of Russia and Great Britain in the Dogger Bank incident. Attempts were made in 1899 to make a resort to a commission of inquiry obligatory, but the opposition of the Balkan States frustrated the attempt. At the Second Conference of 1907 Russia proposed that the commission of inquiry be invested with the power to determine responsibility as well as to ascertain the facts in controversy. The Russian proposal met with opposition and was not adopted. It is to be observed, however, that Great Britain and Russia empowered the commission to find responsibility, and we now have France and Germany conferring like powers upon a commission of inquiry. It is to be hoped that the smaller states will follow the example of the great powers and find it possible to submit the question of responsibility without violating the principle of sovereignty to which they attach an almost incomprehensible reverence.

If, on the other hand, the tribunal is to be regarded as a court in the proper sense of the word, it is to be noted that article 5 permits the tribunal to transport itself to the scene of the controversy or to delegate one or several of its members as provided by article 20 of the convention of October 18, 1907, concerning commissions of inquiry. The opposition of Germany in 1899 to the permanent court seems to be a thing of the past, for Germany has already been a party to two international arbitrations at The Hague, namely, with Venezuela in the case of Germany, Great Britain, and Italy v. Venezuela et al.,[1] and with Japan in the case of Great Britain, France, and Germany v. Japan.[2] It now arbitrates with France, supposed to be its inveterate enemy. The forthcoming arbitration is therefore no ordinary event.

The Moroccan question in its larger aspects, resulting from the change of government, is reserved for a future comment, in order that the necessary documents may be printed in the Supplement and referrd to in the editorial.

[1] See this JOURNAL, 2, 902.
[2] *Idem*, 2, 911.

THE NOBEL PRIZE

The Swedish scientist, Alfred B. Nobel, inventor of dynamite, died December 10, 1896, and established by his will a fund of approximately nine million dollars, the interest of which should every year be distributed to those who had contributed most to "the good of humanity." The interest thus provided for was to be divided into five equal shares and distributed "one to the person who in the domain of physics has made the most important discovery or invention, one to the person who has made the most important chemical discovery or invention, one to the person who has made the most important discovery in the domain of medicine or physiology, one to the person who in literature has provided the most excellent work of an idealistic tendency, and *one to the person who has worked most or best for the fraternization of nations, and the abolition or reduction of standing armies, and the calling in and propagating of peace congresses.*"

The fund become available in the year 1901, and the individual prize, amounting to $40,000, is awarded annually on December 10, the anniversary of Mr. Nobel's death, sometimes to a single individual, at other times divided between two laureates, and in one notable instance to an institution (the Institute of International Law, 1904).[1]

On December 10, 1908, the peace prize was divided between K. P. Arnoldson, of Sweden, and M. F. Bajer, of Denmark. The life work of Messrs. Arnoldson and Bajer brings them within the letter as well as the spirit of the prize, for they have devoted themselves with singleness of purpose to the establishment of peace societies, calculated not only to bring the nations into closer touch, but to eliminate the artificial barriers unfortunately separating them.

Klaus Pontus Arnoldson was born in 1844 and as politician and writer he has espoused the cause of peace. In 1883 he established the Swedish Peace and Arbitration Union, and in numerous writings he has expounded the necessity, the advantages, and the possibility of international peace. Among these may be mentioned "The Peace Movement" (1883); "Is International Peace Possible?" (1890); "Law, not War" (1890); "Cain, the Hero of the Day" (1891); "Pax Mundi," in English (1892); "The Hope of the Centuries" (1901).

Frederik Bajer was born in 1837, and has had a distinguished and varied career. He is president of the International Peace Bureau at

[1] For recipients of prize, see editorial in this JOURNAL, 2, 152.

Berne, member of the International Peace Union in Monaco, member of the Interparliamentary Council, president of the Danish Interparliamentary Group. He knows the advantages of peace, because from 1856 to 1864 he served as an officer in the army and in the war of 1864 took part in the campaign at Schleswig, Veile, and Horsens. Leaving the army he entered public life, and from 1872 to 1895 was a member of the Danish Parliament. At the present moment he holds a distinguished and important position in the Ministry of Foreign Affairs of his country. In 1882 he established the Danish Peace Society, and was likewise founder of the International Peace Bureau at Berne (1891). In Parliament he not only espoused the peace idea in general, but insisted upon the negotiation of arbitration treaties. He has been an indefatigable worker for the peace congresses due to private initiative, and has attended regularly the meetings of the Interparliamentary Union. As a writer he has contributed many articles in Danish, Swedish, French, and German to the cause of peace.

The mere statement of the activity of these distinguished gentlemen not only demonstrates their fitness, but justifies the committee in dividing the prize between them.

THE FIFTEENTH CONFERENCE OF THE INTERPARLIAMENTARY UNION

There are current in the world two opposite opinions regarding the nature and purpose of the state. One of these is that the state is founded upon force, exists only by its might, and that its highest interest lies in the domination of the largest possible number of human beings and the widest possible extent of territory. The other is that the state is founded upon the inherent right of men to life, property, and the free exercise of their faculties, for whose protection alone the state exists, and that it is, therefore, an ethical organism for whose defense force may, if necessary, be employed, but whose essential aim is the further development rather than the subjection of mankind.

According as men accept one or the other of these two conceptions of the state will be their judgment upon the wisdom or folly of that fraternity of the legislators of different countries known as the Interparliamentary Union. If it be true that might is right, that the state knows no law but its own interests, and that its own indefinite expansion and triumph in the struggle for supremacy are its chief motives, it is difficult to see that the deliberations of this and other international

assemblies having for their purpose common action toward the realization of higher civic ideals contain much promise of utility. If, on the other hand, the state is a judicial entity, with reciprocal rights and duties, in a society composed of equals, nothing can be more promising than the union of those who make the laws of civilized countries in the endeavor so to shape the attitude and conduct of all toward one another as to extend to their relations the great principles of jurisprudence which they are accustomed to apply within the sphere of their own jurisdiction.

One may, therefore, regard the amount of public interest in the deliberations of such a body as a just measure of the degree of civilization — as civilization is conceived by the jurist — to which civil societies have thus far attained. Judged by this test, the Fifteenth Conference of the Interparliamentary Union, assembled in Berlin from September 17 to September 19, offers to the world a new proof of the vitality and growth of the juristic idea and marks a manifest advance towards its realization in international affairs.

On August 30, in his notable speech at Strassburg, His Majesty the German Emperor sounded a note of encouragement to all who hope for the pacific development of international intercourse when he emphasized the guaranty of peace to be found "in the consciences of the princes and statesmen of Europe, who know and feel that they are responsible to God for the lives and prosperity of the peoples intrusted to their leadership." It does not diminish but rather increases the significance of this utterance that it was addressed mainly to soldiers, of whose "manly discipline and love of honor" the Emperor spoke with pride as "without menace to others."

Closely following this tribute of strength to the principles of peace, justice and humanity by the German Emperor came the opening address to the Interparliamentary Conference by the Imperial Chancellor, Prince von Bülow. Choosing the French language, of which he is a graceful master, as his medium of expression, the Chancellor cordially welcomed the representatives of the foreign parliaments, who filled the hall of the Reichstag, to the hospitality of the Empire and its capital with the assurance that Germany, with the rest of the civilized world, appreciates the services which the Union is rendering to a noble cause. As the climax to his graceful tribute to M. Frédéric Passy, the venerable dean of that body, the Chancellor defined this cause to be that of "obtaining guaranties for peace and concord among the nations." Difficult as the task of the Union has been recognized to be, the speaker offered his con-

gratulations upon the progress that has been already made, and gave assurance that not only the peoples but the governments were in accord with its high aim. Only with respect to the means to be employed were there any divergences of opinion; and as regards the principle of international arbitration, voluntary or obligatory, Germany had given evidence by treaties already signed of accord and cooperation in the adoption of "all propositions compatible with the interests of legitimate defense as well as with the imprescriptible laws of humanity." As further proof of the interest of Germany in this cause was the ever-increasing number of German deputies who desire to form a part of the Interparliamentary Union. Between the love of peace and the duties of patriotism there is no conflict, for true patriots endeavor to prevent strife by combatting ignorance, revenge, blind hatred, and "ambitions sometimes deceptive." As for Germany, taught by the cruel lessons of the past, she wishes to be strong enough to defend her soil, her dignity and her independence; "she does not, she will not, misuse her force."

Supported by the words addressed by the King of England to the last conference of the Interparliamentary Union — "a ruler can set before himself no higher aim than the promotion of good understanding and most hearty friendship between the nations" — quoted by Prince Heinrich zu Schönlaich-Carolath in his presidential address in opening the conference, the spirit of concord expressed in the Chancellor's utterance became the key-note of all the sessions. Of the public and private hospitality manifested by the city of Berlin and the members of the German Reichstag it is only necessary to say that the guests were received and entertained with generous cordiality, and that no one of the previous conferences was more thoroughly enjoyed by those who participated in it.

The extent and character of the notice accorded to this assembly by the Berlin press was an agreeable surprise to all the foreigners present, and the interest of the general public seemed to grow from day to day. About fifteen hundred persons were present at the reception offered by the Imperial Chancellor in the garden of his palace, including most of the chief officers of the Empire then present in Berlin.

With regard to the program and decisions of the conference, it is impossible within the limits of this article to speak in detail. The work of the Second Hague Conference received unqualified approbation and its results were esteemed to offer great encouragement for the future. The proposed plan for a permanent international court was warmly commended, a general treaty for obligatory arbitration was urged, and the

further consideration of the immunity of private property at sea by the next Hague Conference was earnestly favored.

Two incidents deserve special mention.

An eloquent letter from Mr. Andrew Carnegie was read, in which that eminent advocate of the pacific adjustment of differences between nations suggested the possibility of preventing future wars through the organization of a league of peace to be initiated by the German Emperor. This proposition evoked the assertion by a delegate that no single potentate was in a position to secure the peace of the world, and that such an endeavor on the part of Germany might create distrust among other nations. It was not affirmed, however, that such a league is intrinsically impossible; and tribute was paid to the idea of such an expedient by the declaration that when the world is ready for universal peace no single power could prevent its consummation.

The other incident was the proposition of the Roumanian delegate, Mr. Diesco, that the Czar of Russia should take the initiative in calling the next conference at The Hague and propose the program to be followed. Professor Quidde of Munich suggested that this proposition be referred to the general council, adding that it was, perhaps, not desirable to address this request to the Czar, and that it might be quite as appropriate to address it either to the President of the United States or the Queen of the Netherlands. The Danish delegate, Mr. Beier, supported this suggestion. Mr. Diesco replied that Russia was a country which possessed a historical conscience and followed historical tradition, and that the President of the United States had voluntarily remitted the preliminaries of the last conference at The Hague to the Czar of Russia. Further, in the final act of the last Hague Conference, he declared, it was formally provided that the Czar should convoke the next one; and, it was urged, the propriety of this must be conceded, since the Hague conferences were his work. The subject was finally referred to the council.

The wish is father to the thought, and the learned delegate of Roumania treads manfully in the footsteps of Mr. Beldiman, who endeavored in the Sixth Plenary Session (The Second Peace Conference, Acts and Documents, I:169 *et seq.*) of the Second Hague Conference to secure for Russia the initiative in summoning all future conferences, and who considered the "august initiative as acquired." Mr. Mérey went so far as to say in the name of the Austrian-Hungarian delegation that "we consider the initiative of Russia as definitively acquired in this matter."

The delegations generally paid their respects to Russia as the initiator of the conference idea. It must be remembered, however, that the recommendation speaks for itself and in the recommendation for a future conference Russia is mentioned neither directly nor indirectly. The learned delegate refers to the final act as consecrating Russian initiative. The final act states in unmistakable language that the second conference was proposed in the first instance by the President of the United States of America, that it was convoked by Her Majesty the Queen of the Netherlands, upon the invitation of His Majesty the Emperor of All the Russias. The diplomatic correspondence leading to the second conference shows that President Roosevelt took the initiative, that he issued the call on October 21, 1904, and that the various nations represented at the first conference expressed their willingness to attend a second as stated by President Roosevelt in the second circular letter, dated December 16, 1904. It further appears, as the delegate himself admits, that President Roosevelt renounced the initiative to Russia upon the request of Russia, as stated in a Russian memorandum presented to the President, September 13, 1905, and from the answer of the Secretary of State, dated October 12, 1905. It is not meant to suggest that the initiative taken by President Roosevelt in 1904 confers any permanent right upon the President of the United States to summon the third conference; it is insisted, however, that no nation possesses the exclusive right to initiate or summon this conference and that the expressed language of the final act, far from consecrating the Russian initiative, is an authority to the contrary. The language of the recommendation must be interpreted as any legal document, and if it be interpreted in the light of the final act as suggested by the Roumanian delegate, it would appear that any state represented at the first or second conference may take the initiative. It is important that this be clearly understood, for the conference as an institution should not depend upon any power, whether it be Russia or the United States. It should meet when international opinion requires it to meet, irrespective of the desire of any particular state. No discourtesy is meant to Russia by this simple comment. The original conference was due to the sole initiative of Russia, and the world owes the Czar a debt of gratitude. Finally, it may be said that if, as alleged, the question is already settled in the final act of the Hague Conference, it is difficult to understand why it should be raised in the Parliamentary Union.

Among the amenities of the conference was the presentation of a

peace-flag sent by the American group to the German group, accompanied by a graceful address delivered in German by Representative Richard Bartholdt in which the historic friendship and community of sentiments between the two countries were emphasized.

Of the many great truths uttered during this memorable gathering the most worthy of remembrance, perhaps, is the assertion of the German Chancellor that there is no contradiction between the highest patriotism and the common desire of the nations for peace with their neighbors. It has long been evident that what is most needed to secure the peace of the world is the growth of confidence in the good intentions and the sincerity of all the governments, and this confidence can rest upon no more secure foundation than the honor of the rulers and statesmen who direct their course.

Upon this point we may profitably weigh the words of the German Chancellor when he says: "A rather long experience has convinced me that nothing is so well adapted to destroy misunderstandings as to become acquainted with one another through the establishment of personal relations." This is the aim of the Interparliamentary Union, which periodically brings into contact the representatives of the legislative bodies of different countries. It is a valuable supplement to that continuous personal intercourse which permanent diplomatic missions are intended to promote, and has for its object the same purpose, namely, the consolidation of friendship and the interpretation of the national aims, so likely if not understood to create misapprehension.

It is an auspicious sign of the times that the British Parliament has appropriated three hundred pounds to meet the expenses of the next conference, an example which will no doubt be followed by other nations. If a small fraction of the money expended in preparations for wars which all good men hope may be averted were applied to the direct cultivation of the normal relations which most effectively tend to prevent them, the ends of civilization would be more speedily realized and at far less expense.

THE INSTITUTE OF INTERNATIONAL LAW

The Institute of International Law, composed of specialists in international law selected from the nations at large, held its twenty-fourth session at Florence in the last days of September.[1] The Institute opened on September 28 and was largely attended by its members and associates.

[1] For the origin and purpose of the Institute of International Law, see editorial, this JOURNAL, 1, 135.

The general secretary, Prof. Albéric Rolin, reported upon the work of the institute during the two years which had elapsed since its meeting at Ghent in 1906, and called attention to the order of business, which dealt in the domain of international law proper, with submarine mines, treaties of arbitration, defaulting states, occupation of territories, foreigners in belligerent service, and neutrality; in the domain of conflict of laws, with obligations, movable property, penal law, "ordre public," personal capacity, change of nationality, double taxation, etc. M. Rolin stated that several of the committees had not been able to complete their labors and that the program was one which could not be disposed of in a single session. Of the seventeen topics before the committees only six were taken into consideration, most of them dealing with private international law.

The elaborate report of M. Albéric Rolin upon the conflict of laws *en matière d'obligations* was substantially adopted so far as it related to obligations *ex contractu,* but obligations *quasi ex contractu* and *ex lege* were reserved for future treatment. M. Corsi's report upon the laws which should regulate the obligations between citizens or subjects of different states arising from insurance against accident to workmen was referred back to his committee after receiving various amendments. The illness of M. De Lapradelle prevented the discussion of the rights and duties of neutrals which has so long commanded the attention of the institute. The report of M. Edouard Rolin, the editor in chief of the Revue de Droit International et de Législation Comparée, upon the position of foreigners in the service of belligerents was carried unanimously so far as to assimilate the status of foreigners in belligerent service to the status of nationals in like service. The subject was referred to the committee with instructions to work out the details involved by the adoption of the general principle. M. Strisower's report upon double taxation was referred back to the committee with instruction to confine itself to the question of rights of succession.

In the domain of international law proper the institute approved the committee's draft upon the employment of mines in naval warfare, a question carefully considered by the institute at Ghent in 1906.[2] The question of submarine mines was the subject of a convention at the Second Hague Conference, and it was therefore indispensable to consider the topic not only in the light of the institute's previous action, but from the standpoint of the Hague Conference. The importance of the sub-

[2] See Annuaire, 21, 88–99, 330–345.

ject, therefore, is very great, and the provisional draft will be reconsidered at the next meeting of the institute at Paris in 1910. The draft as approved by the institute follows:

ARTICLE 1. Il est interdit de placer en pleine mer les mines automatiques de contact amarrées ou non.

ART. 2. Les belligérants peuvent pour des raisons stratégiques (1) placer des mines dans leurs eaux territoriales ou dans celles de l'ennemi; (2) mais il leur est interdit:

a. De placer des mines automatiques de contact non amarrées, à moins qu'elles ne soient construites de manière à devenir inoffensives une heure au maximum après que celui qui les a placées en aura perdu le contrôle;

b. De placer des mines automatiques de contact amarrées, qui ne deviennent pas inoffensives dès qu'elles auront rompu leurs amarres.

ART. 3. Il est toujours interdit, tant en pleine mer que dans les eaux territoriales, d'employer des torpilles qui ne deviennent pas inoffensives lorsqu'elles auront manqué leur but.

ART. 4. Il est interdit de placer des mines automatiques de contact devant les côtes et les ports de l'adversaire, dans le seul but d'intercepter la navigation de Commerce.

ART. 5. Lorsque les mines automatiques de contact amarrées sont employées, toutes les précautions doivent être prises pour la sécurité de la navigation pacifique.

ART. 6. Toute Puissance neutre qui place des mines automatiques de contact devant ses côtes doit observer les mêmes règles et prendre les mêmes précautions que celles qui sont imposées aux belligérants.

ART. 7. L'obligation de la notification incombe à l'État belligérant aussi bien qu'à l'État neutre.

ART. 8. À la fin de la guerre, les Puissances contractantes s'engagent à faire tout ce qui dépend d'elles pour enlever, chacune de son côte, les mines qu'elles ont placées.

Quant aux mines automatiques de contact amarrées que l'un des belligérants aurait posées le long des côtes de l'autre, l'emplacement en sera notifié à l'autre Partie par la Puissance qui les a posées et chaque Puissance devra procéder dans le plus bref délai à l'enlèvement des mines qui se trouvent dans ses eaux.

ART. 9. Les Puissances contractantes, qui ne disposent pas encore de mines perfectionnées telles qu'elles sont prévues dans la présente Convention, et qui, par conséquent, ne sauraient actuellement se conformer aux règles établies dans les Art. 1 et 3, s'engagent à transformer, aussitôt que possible, leur matériel de mines, afin qu'il réponde aux prescriptions susmentionnées.

ART. 10. La violation de l'une des règles qui précèdent entraîne la responsabilité de l'État fautif.

It is interesting to compare the project of the institute with the convention adopted at The Hague, for the text of which see this JOURNAL, Supplement, 2, 138.

M. Lyon Caen was elected president and Professor Thomas Erskine Holland vice-president. The following members and associates were likewise elected:

Members (with date of election as associate in parentheses). — Messrs. Beauchet (1892), Corsi (1898), Fauchille (1897), Lawrence (1885), de Liszt (1900), J. B. Moore (1891), Olivi (1891), and Strisower (1891).

Associates. — Messrs. Anzilotti, professor at Bologna; Diena, professor at Siena; Fedozzi, professor at Palermo; Fromageot, technical delegate for France at the Second Hague Conference; Huber, professor at Basel; Mercier, professor at Lausanne; Oppenheim, professor at Cambridge; J. B. Scott, technical delegate for the United States at the Second Hague Conference and solicitor for the Department of State; Takahashi, professor at Tokio; Triepel, professor at Tübingen; Zeballos, professor at Buenos Ayres.

THE INTERNATIONAL LAW ASSOCIATION

The International Law Association held its twenty-fifth session at Budapesth in the last week of September. This very influential association was founded in 1873, the year of the foundation of the Institute of International Law,[1] and year by year has justified its creation. Many and valuable papers have been read before it and the public reports of its proceedings are of value to jurists as well as to students of international law.

The twenty-fifth meeting of the association was no exception to the rule. For example, among the subjects discussed were the following: The question of blockade, by Lord Justice Kennedy, forming the third of a series contributed by him to these conferences; a paper on the international prize court by Sir Thomas Barclay, in which that learned authority characterized the court as revolutionary, and criticized Great Britain for being a party to it; political offenses in extradition treaties; bills of exchange; the enforcement of foreign judgments; the question of divorce jurisdiction; the legal position of shipmasters and mariners; the strike clause in relation to demurrage; workmen's compensation; double taxation; the claims of competing *fisci* to lapsed personalty; and foreign companies in Egypt.

Of these important subjects three are selected for special comment: Lord Justice Kennedy's paper on blockade, extradition of political offenders, and bills of exchange.

[1] See editorial, this JOURNAL, 1, 135.

Lord Justice Kennedy briefly described the three essential conditions of a blockade — namely, effectiveness; notice, actual or constructive; and impartial exercise. He next called attention to the doctrine of continuous voyages as applicable in the matter of contraband and the extension of the doctrine of continuous voyages to blockade. The learned justice approved the doctrine of continuous voyages in the matter of contraband and justified the capture by a belligerent of a neutral vessel proceeding to a neutral port of final destination carrying a cargo consisting wholly or in part of contraband destined by the shipper for the use of the belligerent, and intended to be forwarded to the enemy from the vessel's port of discharge. He, however, disapproved the extension of the doctrine of continuous voyage to a cargo not of a contraband nature but consigned by its shipper to agents at the vessel's port of destination, even although it was the shipper's intention that the cargo be transshipped at a neutral port with the intent to run a blockade. The Anglo-American jurisprudence permits capture from the moment the vessel leaves territorial waters. The French or continental view permits capture and confiscation only within the immediate presence of the blockading squadron and port. The learned justice suggested a compromise between these doctrines by providing that the belligerent's notification of the blockade shall specify a zone within which the blockading force could operate and entry into which would subject all vessels to capture and condemnation unless it be clearly proved that they were not attempting to enter the blockaded port.

Mr. J. A. Barratt, in his interesting paper on extradition, insisted that some limitation is required to the clause which at present exists in most extradition treaties whereby political offenses are excluded; that the growth of anarchism demanded a modification of the existing practice, and he suggested that the modification of the clause be accompanied by provisions insuring that the prisoner after surrender be tried in a uniform and proper manner. The importance of the question led to the passage of the resolution that "it be referred to the executive council of the association to appoint a committee to consider and report upon the subject of extradition with special reference to the matters discussed in the papers presented to this conference, such report to be presented to a future conference."

The most important matter discussed was the question of bills of exchange, and the conclusions of the conference known as the "Budapesth rules" follow:

1. The capacity to contract by means of a bill of exchange shall be determined by general capacity to enter into a contract, but a person, although incapable of binding himself by such a contract in his own country, shall also be bound if he is capable of so binding himself under the law of the country in which he contracts.

2. To constitute a bill of exchange it shall be necessary to insert on the face of the instrument the words, "Bill of exchange," or their equivalent.

3. It shall not be obligatory to insert on the face of the instrument or on any endorsement the words, "Value received," nor to state a consideration.

4. Usances shall be abolished.

5. It is desirable that the validity of a bill of exchange should not be affected by the absence or insufficiency of a stamp.

6. A bill of exchange shall be deemed negotiable to order unless restricted in express words on the face of the instrument or on an endorsement.

7. The making of a bill of exchange to bearer shall be allowed.

8. A bill of exchange shall be negotiable by blank endorsement.

9. The bill of exchange shall not be invalid by reason that it is not dated or does not specify the place where it is drawn or the place where it is payable.

10. The rule of law of *distantia loci* shall not apply to bills of exchange.

11. The mere fact that the bill of exchange was overdue at the time of an endorsement shall not affect the character of the endorsement as such.

12. The acceptance of a bill of exchange must be in writing on the bill itself. The signature of the drawee (without additional words) shall constitute acceptance, if written on the face of the bill.

13. The drawee may accept for a less sum than the amount of the bill. Any other restriction shall be equivalent to refusal.

14. In case of dishonor for nonacceptance or for conditional acceptance, the holder shall have an immediate right of action against the drawer, the endorsers, and any other parties liable for payment of the amount of the bill and expenses, less discount.

15. Where an acceptance is written on a bill and the drawee has parted with the possession of it or has given written notice to or according to the directions of the person entitled to the bill, that he has accepted it, the cancellation of the acceptance shall be of no effect.

16. Where the acceptor shall have committed an act of bankruptcy before due date, the holder shall have an immediate right of action against the drawer, the endorsers, and any other parties liable, for payment of the amount of the bill and expenses, less discount.

17. No days of grace shall be allowed.

18. Protest, or noting for protest according to the law of the country, shall be necessary to preserve the right of recourse upon a bill of exchange dishonored for nonacceptance or for nonpayment.

19. Immediate notice of dishonor must be given; if it be not so given, the party sued shall be discharged to the extent of the loss or damage caused by the want of such notice.

20. The time within which protest must be made shall be extended in the case of *vis major* during the time of the cause of interruption.

21. There shall be no obligation to give a set or a duplicate without an agreement between the parties thereto. But where a bill has been lost before it is overdue, the person who was the holder of it shall be entitled to require of the drawer another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again. No annulling clause need be inserted in duplicates if marked as such.

22. The holder of a bill of exchange shall not be bound in seeking recourse by the order of succession of the endorsements, nor by any prior election.

23. A simultaneous right of action on a bill of exchange shall be allowed against all or some or any one of the parties to the bill.

24. The *donneur d'aval* (surety upon a bill of exchange) shall be equally liable with the person whose surety he is.

25. The owner of a lost or destroyed bill of exchange has, upon giving security, a right to payment of the bill by the acceptor, and the same right against the drawer as he would have had if the bill had not been lost or destroyed.

26. The limitation of actions upon bills of exchange against all the parties shall be 18 months from due date.

27. In the foregoing articles the term bill of exchange shall include promissory notes, where such interpretation is applicable, but shall not apply to cheques.

It was decided that the executive council should communicate the rules to the various governments, especially the Dutch Government, which intends to invite — and actually has invited — the other governments to an international conference on the subject.

THE ANNUAL MEETING OF THE SOCIETY OF INTERNATIONAL LAW

The third annual meeting of the American Society of International Law will be held at the New Willard Hotel, Washington, D. C., Friday and Saturday, April 23 and 24, 1909. There will be three sessions on Friday, the 23d, beginning, respectively, at ten in the morning, half-past two, and eight in the evening. There will be but one session on Saturday, beginning at ten in the morning. In the afternoon it is expected that the President will receive the members of the Society at the White House, and in the evening at half-past seven the annual banquet will be held.

The program of the meeting, together with the names of those who take part in the proceedings and the speakers at the banquet, will be shortly sent to every member of the Society in the hope that a notice so far in advance will enable the members to attend more largely than formerly. The tentative program follows:

FRIDAY, APRIL 23, 1909

Ten o'clock

Presidential address.

Topic: Arbitration as a judicial remedy: an examination of concrete cases actually submitted and decided by arbitration; how far they are of a judicial character and how far they have been governed by diplomatic convenience.

Half-past two o'clock

Topic: The nature and definition of political offense in international extradition.

Eight o'clock

General address:

The development of international law by judicial decisions in the United States:

1. **The Supreme Court.**
2. **The Court of Claims.**

SATURDAY, APRIL 24, 1909

Ten o'clock

Topic: The constitution and powers which an international court of arbitral justice should possess.

Topic: The equality of nations.

Half-past two o'clock

Reception by the President of the United States to the members of the Society at the White House.

Half-past seven o'clock

Banquet at the New Willard Hotel.

The committee in charge of the program has aimed to give continuity to its proceedings and make the published volume containing them of permanent value. It is a commonplace that international disputes should be arbitrated rather than settled by force, but to be effective arbitration should be a judicial method. Negotiation and compromise belong to diplomacy, not to the law court. The committee therefore has decided to submit arbitral decisions to a careful and seaching examination in order to ascertain in how far arbitration has been judicial and in how far, judged by concrete cases, nations have submitted and therefore are willing to submit international controversies to judicial settlement. Having thus shown that international disputes are constantly settled by

arbitration and that arbitration either is or should be judicial rather than diplomatic, Saturday morning's session will be devoted to a consideration of the question whether a permanent court rather than temporary commissions should not be constituted in which nation may sue nation without the embarrassment and delay necessarily involved in the selection of judges and the constitution of a court.

In the next place the composition and necessary powers of the court will receive careful consideration, and it is hoped that members of the Society — perhaps the Society itself — will express its views upon the modification in actual practice of the theoretical equality of states. If a permanent court could be composed of one member from each nation the problem would be simple, but to be wieldy and serviceable the judges can not well represent more than a third of the nations at one time. The great difficulty is therefore to devise a method of composition acceptable to all members of the family of nations. It is the hope of the committee that the leading papers and the discussions upon the floor will throw light upon the subject and that they will in printed form appeal to a large circle of readers.

The occasional request for extradition of a fugitive for an alleged political offense makes the question of "the nature and definition of political offense in international extradition" timely as well as important. The subject is timely because the fugitive pleads the political nature of his offense if there be the slightest justification for it. The subject is important because our treaties of extradition forbid the surrender of the fugitive for the commission of a political offense. It is therefore essential that the nature and definition of a political offense be clearly understood.

It is frequently stated that the Supreme Court of the United States is the prototype of a supreme court of nations, and partisans of an international tribunal refer with pleasure and pride to our Supreme Court. As the Constitution provides that members of the American Union may sue and be sued in the Supreme Court, and as the causes of suit may be infinitely varied, it follows that the Supreme Court is often called upon to render decisions of great importance to international law. If we bear in mind that the Supreme Court has original jurisdiction "in all cases affecting ambassadors, other public ministers and counsels, and those in which a State shall be a party," it is obvious that the Supreme Court of the United States must deal with many and intricate questions of international law. It is therefore not only interesting but important that the functions of the Supreme Court in the development of inter-

national law be made clear. As the United States is suable in its Court of Claims, and as many international claims have been decided by this tribunal, a survey of its jurisdiction and important decisions will be of genuine interest to students of international law.

As every paper is open to discussion, it is not unreasonable to expect that the third annual meeting of the Society will be both interesting and profitable.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

July, 1908.

1 China. New regulations concerning introduction of arms and munitions into China take effect. Text in *B. del ministero degli affari esteri,* Rome, August, 1908.

5 Italy. Decree giving execution to arrangement signed at Rome December 9, 1907, for creation of an international office of public hygiene with seat at Paris. *Ga. Ufficiale,* July 15; *B. del ministero degli affari esteri,* July, 1908; *R. di dr. int.* 3:193, which contains the organic statutes of the office. Ratifications have been deposited at Rome by Italy, France, Belgium, Switzerland, Great Britain, Russia, Brazil, Spain, and United States. This convention was drawn up at the sixth international sanitary conference which met in Rome, December 3, 1907, with the aim of providing for such an institution, which had already been agreed upon in principle at the fifth conference held at Paris in 1903. The office will be directed by a committee composed of delegates from all the countries participating in its formation. *See December 9, 1907, and November 17, 1908. J. O.,* December 11.

10 International Conference on Bibliography at Brussels. *Polybiblion, Partie littéraire,* 67:275.

July, 1908.

11 NETHERLANDS. Law approving international convention signed at Berne September 26, 1908, respecting prohibition of use of white phosphorus in manufacture of matches. Signatory powers: Germany, Denmark, France, Italy, Luxemburg, Netherlands, Switzerland. *Staatsb.*, 1908, No. 224; *R. de dr. int. privé et de dr. pénal int.*, 2:798 and 4:695.

11 NETHERLANDS. Law ratifying international convention signed at Berne September 26, 1906, for prohibiting night work of women engaged in industries. *Staatsb.*, 1908, No. 225. Signatory powers: Germany, Austria, Hungary, Belgium, Denmark, Spain, France, Great Britain, Italy, Luxemburg, Netherlands, Portugal, Sweden, Switzerland.

16 ARGENTINE REPUBLIC—PARAGUAY. Approval by Paraguay of convention signed at Buenos Aires May 30, 1908, regulating the interchange of live stock between the two countries. *B. A. R.*, October.

17 ABYSSINIA—ITALY. Ratification by Italy of (1) the convention for delimitation of the frontier between Abyssinia and Italian Somaliland; (2) the convention for delimitation of the frontier between Abyssinia and Eritrea; and (3) the act additional to (1) for payment to Abyssinia of three million lire, — all signed at Adis Ababa May 16, 1908. *Ga. Ufficiale*, August 8; *B. del ministero degli affari esteri*, August; *R. di dr. int.*, 3:189. These agreements complete, on the side of Abyssinia, the delimitation of the Italian colonies Eritrea and Somaliland, — on the eastern frontier of the former and the northern of the latter — thus closing the boundary lines already established by the protocols with Great Britain concerning spheres of influence signed March 24 and April 15, 1891 (*State Papers*, 83:19), and May 5, 1894 (*State Papers*, 86:55); the supplementary agreements with the Egyptian and Sudanese governments signed December 7, 1898, June 1, 1899, April 16 and November 22, 1901; the treaty with Abyssinia signed July 10, 1900, the protocols with France signed January 24, 1900, and July 20, 1901; and the convention with Great Britain and Abyssinia signed May 15, 1902. *Trattati e convenzioni fra il regno d'Italia e gli altri stati*, vols. 15 and 16; *Trattati, convenzioni, accordi, protocolli ed altri documenti relativi all'Africa*, 3 vols., Rome, 1906. The last-mentioned convention traced the mutual frontier of Abyssinia and the Anglo-Egyptian

July, 1908.

Sudan as far south as the intersection of 35° E. with 6° N. No arrangement was then arrived at respecting the southern frontier of Abyssinia, on which side the British East Africa and Uganda Protectorates were the other parties concerned. This section was defined by an agreement signed at Adis Ababa December 6, 1907, by Abyssinia and Great Britain relative to the frontiers between British East Africa, Uganda and Abyssinia. *Geographical J.*, 21:186; *id.*, 32:621, 622; *Treaty ser.*, 1908, No. 27. *See May 16, 1908.*

20 NETHERLANDS—VENEZUELA. Venezuela hands passports to Netherlands minister. *Ga. oficial*, July 21; *Documentos del General Cipriano Castro*, 6. *See September 3, 1908.*

22 INTERNATIONAL. Protocol signed at Brussels providing for suspension for four years from February 15, 1909, of importation and sale of munitions of war in certain regions of Africa. Contracting parties: France, Germany, Spain, Great Britain, Kongo, Portugal. Confirmed by all. *J. O.*, October 15; *Treaty ser.*, 1908, No. 29. An application of Articles 1, 3, 8 and 9 of the General Act signed at Brussels July 2, 1890 (*State Papers*, 82:55; *N. R. G.*, 17:345; *Compilation of treaties in force, 1904*, 861). *See April 28, 1908.*

23 GREAT BRITAIN—LIBERIA. Agreement signed at Monrovia modifying treaty of commerce signed at London November 21, 1848. *Treaty ser.*, 1908, No. 26; *State Papers*, 36:394.

23 PRUSSIA—NETHERLANDS. Treaty signed at Berlin concerning railroad between Neuenhaus and Coevorden. *Preuszische Gesetzsammlung*, 1908, No. 38.

29 ELEVENTH INTERNATIONAL CONGRESS AGAINST ALCOHOLISM at Stockholm. Adjourned August 3. It was determined to establish an international bureau at Lausanne. Next congress at London July 18, 1909. *B. del min. de rel. ext.* (Buenos Aires), 20:630. The earlier congresses have been held at (1) Antwerp, 1885; (2) Zurich, 1887; (3) Christiania, 1890; (4) The Hague, 1893; (5) Basle, 1895; (6) Brussels, 1897; (7) Paris, 1899; (8) Vienna, 1901; (9) Bremen, 1903; (10) Budapest, 1905.

August, 1908.

6 FIFTH PAN-AMERICAN MEDICAL CONGRESS opened at Guatemala. Next congress at Lima. *Mém. dipl.*, September 20.

August, 1908.

8 PANAMA—UNITED STATES. Final report of commissioners appointed in accordance with treaty signed at Washington, November 18, 1903 (*For. rel.*, 1904). Claims. *Diario oficial*, September 12; *B. A. R.*, December.

10 UNITED STATES—URUGUAY. Naturalization treaty signed at Montevideo. Ratification advised by the United States Senate, December 10.

12 JAPAN. Korean patent ordinance, Korean design ordinance, Korean trademark ordinance, Korean trade name ordinance, and Korean copyright ordinance promulgated. Also an ordinance relating to the protection of rights of patents, designs, trademarks, and of copyrights in the province of Kwantung and in other countries where Japan exercises extraterritorial jurisdiction. These ordinances took effect August 16, 1908.

19 COLOMBIA—GREAT BRITAIN. Colombian decree ratifying treaty signed at Bogotá December 22, 1906, relative to industrial property. Ratified by Great Britain February 29, 1908. *B. del ministerio de rel. ext.*, 2:288.

19 COLOMBIA—SWITZERLAND. Colombian law, No. 15, approving treaty signed at Paris March 14, 1908. Friendship and commerce. *B. del min. de rel. ext.*, 2:12, 25.

19 COLOMBIA. Law ratifying convention signed at Mexico January 29, 1902, at the second Pan-American conference. *B. del min. de rel. ext.*, 2:144, 152. Rights of aliens.

21 COLOMBIA. Law ratifying sanitary convention signed at Washington October 14, 1905, by delegates of Chile, Costa Rica, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, United States, Cuba, Venezuela. Colombia and Brazil were not represented at the Washington conference, but signed it at the third Pan-American sanitary conference held at Mexico, December, 1907. *B. del min. de rel. ext.*, 2:16, 27. *See December 2, 1907, January 9, 1908, and May 29, 1906.*

26 INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY. Twelfth Congress at Stockholm. Adjourned August 30. *Propriété industrielle*, September 30, 1908; *Dr. d'auteur*, 21:154. *See September 14, 1906.*

28 COLOMBIA. Law No. 23 ratifying treaty signed at Mexico January 30, 1902, respecting arbitration of pecuniary claims. Signatory

August, 1908.

powers: Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, United States and Uruguay. *For. rel.*, 1905; *Documents, ante*, 1:303; *B. del min. de rel. ext.*, 2:146, 155.

28 COLOMBIA. Law No. 24 ratifying convention signed at Mexico January 27, 1902, respecting exchange of official publications. Signatory powers: Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, United States, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay. *B. del min. de rel. ext.*, 2:148, 159.

29 COLOMBIA. Law No. 27 ratifying convention signed at Rio de Janeiro August 13, 1906, respecting pecuniary claims. *B. del min. de rel. ext.*, 2:150, 164.

29 COLOMBIA. Law No. 28 ratifying convention signed at Rio de Janeiro August 13, 1906. Condition of naturalized citizens who renew residence in country of origin. *B. del min. de rel. ext.*, 2:151, 166.

September, 1908.

1 GREECE—NORWAY. Direct money order exchange organized on the basis of the arrangement signed at Rome. *L'Union postale*, 33:176.

2 NETHERLANDS. Circular note to all governments represented at the second Hague conference, proposing, at the instance of the German and Italian governments, an international conference to meet at The Hague for the purpose of promoting uniform legislation concerning letters of exchange. *U. S.: H. R. Doc.*, 1243, 60 Congress.

2 GUATEMALA. Decree setting September 15 for inauguration of the Central American Bureau provided for in the convention signed at Washington, December 20, 1907. *El Guatemalteco*, September 8.

3 NETHERLANDS—VENEZUELA. Note of Netherlands to Venezuela. Netherlands states she will consider herself exonerated of the obligations of the protocol signed at The Hague, August 20, 1894 (*State Papers*, 86:543), if, after November 1, 1908, the Venezuelan decree of May 14, 1908, *q. v.*, and the measures connected with

September, 1908.

it still operate against the Dutch colonies. *El constitucional* (Caracas), November 16; *Documentos relativos á la cuestion venezolano-holandesa, edicion oficial, 1908,* Caracas. The grievances of Venezuela are stated to be (1) the letter dated Caracas, April 9, 1908, from the Dutch minister to an Amsterdam commercial association, and published in Amsterdam in May; (2) disturbances committed by the populace of Curaçao against the house where the Venezuelan consulate was established and against the persons of its inmates; (3) omission of a salute by the Dutch warship Gelderland. The grievances of the Netherlands against Venezuela are: (1) embargo of ships; (2) measures against the commerce and navigation of Curaçao; (3) suppression of the exequaturs of Dutch consular functionaries. *De Haseth Cz: Le différend entre la Holland et le Venezuela, Q. dipl.,* 26:407; *Ga. oficial* (Caracas), July 30; *Documentos del General Cipriano Castro,* 6:247.

8 FIRST INTERNATIONAL CONGRESS FOR REPRESSION OF ADULTERATION OF ALIMENTARY AND PHARMACEUTICAL PRODUCTS, at Geneva. *Science,* 27:475.

8 INTERNATIONAL CONGRESS FOR ABOLITION OF TRADE IN WHITE WOMEN convened at Geneva.

8 SIXTEENTH INTERNATIONAL CONGRESS OF AMERICANISTS met at Vienna. Adjourned September 14. *Geographical J.,* 32:376. Object: To promote scientific inquiries into the history of both Americas and their inhabitants.

14 FRANCE—ITALY. Ratifications exchanged at Rome of convention signed at Rome, July 18, 1907, supplementing the provisions of the convention signed July 16, 1899, relative to telephone service, and creating a service of notices of telephone calls. French decree promulgating, October 11. *J. O.,* October 14; July 18.

15 Inauguration at Guatemala of International Central American Bureau. *B. A. R.,* October; *El Guatemalteco,* September 8.

15 INTERNATIONAL CONGRESS OF ASTRONOMERS opens at Vienna. *Mém. dipl.*

15 BRAZIL—NETHERLANDS. Ratifications exchanged at The Hague of treaty signed at Rio de Janeiro May 5, 1906. *Diario official,* September 26. Boundary of Surinam. *Lagemans:* 16:82; *Staatsb.,* 1908, No. 220. The frontier follows the watershed of the

September, 1908.

Tumucumaque mountains from headwaters of Maroni river to those of Corentyne, near which the line meets the frontiers of French and British Guiana.

15 THIRD INTERNATIONAL CONGRESS FOR THE HISTORY OF RELIGIONS at Oxford. *Times,* September 15, 21; *Nation,* October 1; *The Oxford congress, Spectator,* September 26.

17 INTERPARLIAMENTARY UNION met at Berlin. Fifteenth congress. Next congress at Quebec. *Times,* September 17, 21.

17 FRANCE. Decree. Administrative regulations of criminal jurisdiction in Siam in respect to French protégés of Asiatic origin. *J. O.,* September 20; *R. de dr. int. privé et de dr. pénal int.,* 4:851; *Regelsperger: Le nouveau traité franco-siamois; R. gen. de dr. int. public,* 25:24.

22 MOROCCO. German reply to the Franco-Spanish circular note of September 11 to the powers signatory to the Act of Algeciras, as to recognition of Mulai Hafid. The reply begins by recording the agreement of the German government in the principle that only interests common to all the powers ought to be taken into account in determining the conditions on which Mulai Hafid should be recognized. Subject thereto, Germany does not object to the suggestion that certain guarantees required by those interests should be demanded of Mulai Hafid. It is her view, however, that the demand should be made by the doyen of the whole diplomatic corps at Tangier. With regard to the guarantees to be demanded, Germany has no objection to offer to the demand that Mulai Hafid must recognize the Algeciras Act as well as the measures taken to give effect to its application, with the reservation that such measures be legal under Moroccan State law. *Doc. dipl., Affaires du Maroc, IV, 1907–1908.* The Franco-Spanish note to Mulai Hafid was handed to Morocco at Tangier, November 19. By definitively accepting this note, approved by the powers signatory to the Act of Algeciras, and fixing the conditions on which these powers consent to recognize him, Mulai Hafid confirms the Act of Algeciras, confirms the other treaties and engagements of the magzhen, confirms the powers of the Casablanca indemnity commission, undertakes to pay its judgments, and disavows a holy war. Moreover, France and Spain preserve the right to make direct demand for settlement of their special

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interests, notably reimbursement of military expenses and indemnity for murders of their nationals.

22 INTERNATIONAL LAW ASSOCIATION. Twenty-fifth congress at Budapest. *See August 29, 1907.* The most important result of the congress is an elaborate international scheme, consisting of twenty-seven rules, to govern the law relating to bills of exchange.

22 FOURTH INTERNATIONAL FISHERIES CONGRESS opened at Washington. Previous congresses were held in Paris, 1900; St. Petersburg, 1902, and Vienna, 1905. *B. A. R.*, June.

22 TWELFTH INTERNATIONAL PRESS CONGRESS opened at Berlin. *Mém. dipl.*, September 27; *Diplomacy and the press, Spectator*, September 26. *See September 22, 1907.*

22 INTERNATIONAL. Ratifications deposited at Berne of the convention signed at Berne September 19, 1906, by Austria, Hungary, Belgium, Germany, France, Denmark, Italy, Luxemburg, Netherlands, Roumania, Russia, and Switzerland. The second convention additional to the international convention signed at Berne October 14, 1890 (*N. R. G.*, 19:289; *State Papers*, 82:771, 796), on railroad transportation of freight. French decree promulgating, October 17, 1908. *J. O.*, October 24; *Reichs-G.*, 1908, No. 53.

23 NETHERLANDS—PERU. Ratifications exchanged at Lima of consular convention signed at Lima September 25, 1907, *q. v. Staatsb.*, 1908, No. 303. Dutch decree proclaiming, September 28, 1908. *See January 16, 1908.*

23 BULGARIA—TURKEY. Turkish note presented to Bulgaria respecting occupation of the Oriental Railways in Bulgaria by Bulgarian troops. Observes that the occupation is an infringement of the rights of property of Turkey in the railway and that these rights are guaranteed by the treaty of Berlin. Requests Bulgarian government to give necessary orders for evacuation of the line and delivery to the company. The Bulgarian government replied September 24, stating that the transfer of the line and its working by them were a consequence of the strike and had taken place with concurrence of the company, and that restoration to the company is a question that will be arranged between Bulgaria and the company. The protest of the company, dated October 10, appears in *J. des débats*, October 18.

September, 1908.

25 PERSIA. Rescript fixing date of the convention of the Mejliss and the Senate for November 14. Tabriz is excluded from its provisions until order and security are re-established there. *Times,* October 3. *See November 19, 1908.*

25 FIRST INTERNATIONAL CONGRESS ON MORAL EDUCATION opened at London. *Times,* September 25.

26 ECUADOR—PANAMA. Sanitary convention signed at Quito. *B. A. R.,* December.

26 Unveiling of a statue raised to commemorate the tercentenary of Alberico Gentili at San Ginesio, his birthplace. Author of De jure belli and De Legationibus. *Times,* September 27; *Agabiti: Alberico Gentili, fondatore della scienza del diritto internazionale,* Fermo, 1908, 85 pp.

26 GREAT BRITAIN. Order in council revoking the Brunei orders in council, 1901 and 1906 (*Hertslet,* 23:285), which provided for the exercise of British power and jurisdiction in Brunei. The British government and the Sultan of Brunei entered into an agreement December 3, 1905, providing for the reception by the Sultan of a British officer to be styled the Resident, as the Agent and Representative of the British Crown. By The Courts Enactment, 1908, the Sultan has made legislative provision for the constitution and powers of the Resident's court and other civil and criminal courts subordinate thereto. Brunei was placed under British protection in 1888. *London Ga.,* October 6, 1908.

28 SIXTH INTERNATIONAL TUBERCULOSIS CONGRESS opens in Washington. Next congress at Rome in 1911.

28 THIRTIETH CONGRESS OF THE INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION, at Mayence. For proceedings, see *Dr. d'auteur* 21:131. *See August 26, 1907.*

28 BRAZIL. Decree No. 1963, approving convention signed at Rome June 7, 1905, creating an International Institute of Agriculture with seat in Rome. *See January 29, May 30, and November 27, 1908.*

28 INSTITUT DE DROIT INTERNATIONAL. Twenty-fourth session convened at Florence. *R. di dr. int.,* 3:132. Next meeting at Paris in 1910. *De Labra: El instituto de derecho internacional,* Madrid, 1907; *Times,* October 8, contains summary of proceedings. *See September 19, 1906*

September, 1908.

30 BELGIUM signed two Hague conventions of July 17, 1905, respecting (1) civil procedure and (2) marriage. The former was signed by Norway July 5, 1907, by Denmark July 13, 1907. *See July 15, 1907. La codification du droit international privé, Bulletin des conferences de la Haye,* La Haye.

October, 1908.

1 SECOND INTERNATIONAL CONGRESS OF POPULAR EDUCATION met at Paris. The first congress was held at Milan, September, 1907.

1 GREAT BRITAIN—UNITED STATES. Inauguration of penny postage by special agreement. Colonies and island possessions not included. *Heaton: The fight for universal penny postage, Nineteenth century,* 64:588.

1 JAPAN—SIAM. Direct money order exchange organized on basis of Rome arrangement. *L'union postale,* 33:176.

1 ARGENTINE REPUBLIC—BRAZIL. Brazilian decree No. 1971, approving arbitration treaty signed at Rio de Janeiro September 7, 1905. *Diario official,* October 3, 1908; *For. rel.,* 1905, p. 103; *B. A. R.,* December, 1908; *Documents, post.*

3 AUSTRIA-HUNGARY. Circular note to European powers announcing decision to occupy Bosnia and Herzegovina definitively. Text, *Journal des débats,* October 9; *Q. dipl.,* 26:508; *R. gén. de dr. int. public,* 15:35 (documents).

5 FIRST INTERNATIONAL CONGRESS ON REFRIGERATING INDUSTRIES at Paris. *Boole: Science in refrigeration, Bulletin No. 70 of the American Chamber of Commerce in Paris; Times,* October 14, 21; *Payen: Le congrés international du froid, Q. dipl.,* 26:574. Next congress at Vienna in 1910.

5 BULGARIA. Prince Ferdinand proclaimed independence of Bulgaria and assumed title of King. Ferdinand, youngest son of the late Prince Augustus of Saxe-Coburg and Gotha and the late Princess Clementine of Bourbon-Orleans (daughter of King Louis Philippe), was born February 26, 1861; was elected Prince of Bulgaria by unanimous vote of the National Assembly July 7, 1887; assumed the government August 14, 1887, in succession to Prince Alexander, who had abdicated September 7, 1886. His election was confirmed by the Porte and the Great Powers in March, 1896. Married (1) April 20, 1893, to Marie Louise (died January 31,

October, 1908.

1899), eldest daughter of Duke Robert of Parma; (2) February 28, 1908, to Princess Eleonore of Reuss Köstritz. For text of Ferdinand's manifesto at Tirnovo proclaiming independence, *Mém. dipl.*, October 11. By the treaty signed at Berlin, July 13, 1878, Bulgaria was constituted an "autonomous and tributary principality under the suzerainty" of Turkey. The treaty provided that the prince of Bulgaria should be freely elected by the population and confirmed by Turkey, with the consent of the powers; that Bulgaria should pay annual tribute to Turkey and should bear a portion of the Turkish public debt. The same treaty provided that Eastern Rumelia should remain subject to the direct political and military authority of Turkey, while retaining administrative autonomy. The position of Eastern Rumelia was altered by an agreement signed at Constantinople April 5, 1886, by Great Britain, France, Russia, Germany, Austria-Hungary, Italy, and Turkey, whereby it was provided that the office of governor-general of the province created by Article XVII of the Berlin treaty should be vested in the Prince of Bulgaria. Bulgaria has never paid the tribute due to Turkey under Article IX of the Berlin treaty, nor borne any share of the Ottoman debt. Eastern Rumelia has paid some tribute and some share of interest on the debt under Clause III of the Constantinople agreement, but not regularly. *The ambitions of Bulgaria, Spectator,* September 26; *Hanotaux: Le congrès de Berlin, R. des deux mondes,* 47:241; *The Balance of Power in the Balkan peninsula, Times,* September 9, 14, 16, 21, 26, 29; *Sariivanoff: La Bulgarie est-elle ....un état mi-souverain?* Paris, 1907; *Stead: Ferdinand I, Czar of the Bulgars, R. of R.,* 38:554; *Omer Lutfi: Die volkerrechtliche Stellung Bulgariens und Ostrumeliens,* Erlangen, 1903; *Serkis: La Roumélie Orientale et la Bulgarie actuelle,* Paris, 1898; *Karamichaloff: La Principanté de Bulgarie au point de vue du droit international,* Lausanne, 1897; *Balaktschieff: Die Rechtliche Stellung des Fürstentums Bulgarien,* Würtzburg, 1893; *Massy: The Bulgarian point of view, Nineteenth Century,* 64:719; *Calchas: The problem of the near East, Fortnightly R.,* 84:735; *Henry: Des monts de Bohème au Golfe Persique,* Plon, 1908; *Svetozar Tonjoroff: Bulgaria and the treaty of Berlin, North American R.,* 188:833; *Sofia: The lesser tsar, National R.,* 52:583; *Gauvain:*

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La crise orientale, Q. dipl., 26:461; *Scelle: Le situation diplomatique de la Bulgarie avant la proclamation de son indépendance le 5 octobre 1908, R. gén. de dr. int. public,* 15:524.

6 TURKEY. Circular note to the powers signatory to the treaty of Berlin respecting the Bulgarian proclamation of independence. The note concludes:

The Imperial Government could resort to force to secure the protection of its rights, but being, above all, respectful to treaties, and anxious for the general interests involved in the general need for European peace, it desires to avoid such an extremity, and appeals to the Great Powers. It awaits with calm their decision. Nevertheless, it protests against the infraction of the treaty, and reserves the rights conferred by that instrument and the international convention to which it is a corollary. Text, *Journal des débats,* October 9; *Times,* October 9.

7 AUSTRIA-HUNGARY. Emperor issued a proclamation to the people of Bosnia and Herzegovina annexing those provinces. This was published in the *Wiener Zeitung* on this date, also the letter dated October 3 of the Emperor to the states signatory to the treaty of Berlin, an imperial rescript to Baron Aehrenthal, an imperial rescript to the president of the Austrian council, and an imperial rescript to the president of the Hungarian council. *Mém. dipl.,* October 11; *Blennerhassett: Austria and the Berlin treaty, Fortnightly R.,* 84:751; *Diplomaticus: The secret treaty of Reichstadt, id.,* 84:828; *Blocq: La replique Austro-Allemande, Nouvelle R.,* 6:124; *François-Joseph, roi des serbes, Nouvelle R.,* 6:241; *Britannicus: Austria-Hungary and the near East, North American R.,* 188:823; *Sellers: The power behind the Austrian throne, Fortnightly R.,* 84:925; *Viator: The truth about Bosnia and Herzegovina, Fortnightly R.,* 84:1007; *Ivanovitch: Europe and the annexation of Bosnia and Herzegovina, Fortnightly R.,* 85:1; *R. gén. de dr. int. public,* 15:33 (documents); *Holland: The European concert in the Eastern question,* Oxford, 1885, is a collection of treaties and other public acts; *Younghusband: Near Eastern questionings, National* R., 52:725; *Reich: The Austro-Hungarian case, Nineteenth century,* 64:705; *Yokanovitch: An English bibliography* [1480–1906] *on the near Eastern question,* Belgrade (the forty-eighth part of the *Spomeniks*). An epitome

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of the negotiations between Austria-Hungary and Russia on the program of the proposed Balkan conference is contained in a *communiqué* issued at Vienna December 28 and printed in *Times* December 29.

7 SERVIA. Proclamation protesting to the powers against the annexation of Bosnia and Herzegovina. *Times*, October 9; *Mém. dipl.*, October 11. A royal ukase convoked the Skupshtina in extraordinary session for October 10. For proceedings, *Mém. dipl.*, October 18.

7 MONTENEGRO. Proclamation declaring that Article XXIX of the treaty of Berlin could no longer be binding on Montenegro. *Mém. dipl.*, October 11. The restrictions imposed upon Montenegro by this article were mainly provisions in favor of Austrian control of the entrances and exits of Montenegro.

8 CHINA—UNITED STATES. Treaty of general arbitration signed at Washington. Ratification advised by the Senate, December 10.

8 CHINA. Peking-Hankow Railway redemption contract signed at Peking. The contract provides for a loan of £5,000,000. Of the proceeds 80% will be applied to the redemption of the Peking-Hankow Railway and the balance applied in China to productive works under the control of the Ministry of Communications. *Times*, October 9, 28.

9 DENMARK—NORWAY. Treaty of arbitration signed at Copenhagen. *Mém. dipl.*

12 INTERNATIONAL CONFERENCE ON ELECTRICAL UNITS AND STANDARDS met at London. The main object of the conference is to obtain international agreement on the three electrical units — the ohm, the ampère, and the volt. *Times*, October 7, 14, 21, 28.

12 CRETE. The chamber, convoked in extraordinary session, is opened by the president of the government in the name of the King of Greece, and union with Greece is formally voted. October 13 the Cretan chamber elected a committee entrusted with the task of governing the island in the name of the King of Greece and according to Greek laws, to be put in force by decrees, the power of the committee to end when Greece assumes administration.

12 FIRST INTERNATIONAL ROAD CONGRESS meets at Paris. *Times*, October 6, 13, 27. Next congress at Brussels in 1910.

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12 SOUTH AFRICA. **Conference on Closer Union opened at Durban to** devise a practical scheme for federation of Cape Colony, Natal, Transvaal, Rhodesia, and Orange River Colony. *Times,* October 6.

13 SWITZERLAND—UNITED STATES. Ratification by Switzerland of arbitration convention signed at Washington, February 29, 1908: ratification advised by the U. S. Senate, March 6, 1908; ratified by the President, May 29, 1908; ratifications exchanged at Washington, December 23, 1908; proclaimed, December 23, 1908. *U. S. Treaty ser.,* No. 515.

14 FRANCE—GREAT BRITAIN. Exchange of notes at London renewing for a further term of five years the arbitration agreement signed at London October 14, 1903. *Treaty ser.,* 1903, No. 18; *id.,* 1908, No. 34.

14 CHINA—GREAT BRITAIN. Ratifications exchanged at Peking of Tibetan trade regulations signed at Calcutta April 20, 1908. *Times,* October 15. *See April 20, 1908.*

14 SECOND INTERNATIONAL CONFERENCE for revision of the Berne copyright convention opened at Berlin. The objects were to examine the agreements which form the basis of the international union for protection of copyright property and to agree upon amendments rendering them more effective. The first conference took place at Paris in 1896. *See November 13, 1908. Delzons: La propriété artistique et littéraire à la conférence de Berlin, R. des deux mondes,* 47:669; *Raqueni: Le congrès littéraire de Berlin, La nouvelle R.,* 5:525.

16 LIBERIA. Accession to the international copyright convention signed at Berne September 9, 1886, and the additional act and declaration signed at Paris May 4, 1896. *Treaty ser.,* 1908, No. 30; *Dr. d'auteur,* 21:145.

18 BELGIUM—KONGO. Belgian law approving treaty of cession of Kongo to Belgium signed at Brussels November 28, 1907. *Mém. dipl.,* October 25; *Arch. dipl.,* 107:291; *Daniels: The Congo question and the Belgian solution, North American R.,* 188:890; *Cd.,* 4396. *See November 28, 1907, and November 4, 1908.* A law of this date also approves the additional act signed March 5, 1908. *Arch. dipl.,* 107:293.

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19 CHINA. Imperial edict stating that the government has abandoned its monopoly of the opium-selling business, and that a licensing system will be substituted. *Times,* October 20; ***Cd.,* 4316; *The opium question, North China Herald,* 89:433; *China: The abolition of opium, Times,*** April 4, 1908. ***See March 22 and April 17, 1908.***

19 First meeting of the council of the INTERNATIONAL ELECTRO-TECHNICAL COMMISSION at London. *Times,* October 8, 20, 28. A preliminary meeting of the international electro-technical commission was held in London in June, 1906. This commission was formed for the purpose of carrying out the resolution of the Chamber of Government Deputies at the International Electric Congress held at St. Louis in September, 1904. The resolution passed at the congress recommended that steps should be taken to secure cooperation of the technical societies of the world by the appointment of a representative commission to consider the question of the standardization of the nomenclature and ratings of electrical apparatus and machinery.

27 GERMANY—GREAT BRITAIN. Agreement and protocol signed at London with regard to sleeping sickness. *Treaty ser.,* 1908, No. 28. Takes effect January 1, 1909, for three years and automatically for further periods of one year until denounced by one of the parties six months before the expiration of that year. Cooperation in combating the disease will take the form chiefly of exchanging reports of cases and in arranging for destruction when virus is transmitted by flies or mosquitoes. ***See March 9, 1908.***

27 BULGARIA. France, Great Britain, and Russia present at Sofia an identical note expressing hope that Bulgaria will send to Constantinople an envoy to open negotiations with the end of securing from Turkey an acknowledgment of independence and of coming to an agreement as to compensation to Turkey. The powers declare themselves ready to recognize fully at a conference such agreement. *Mém. dipl.,* November 1; *Times,* October 28. The German and Italian diplomatic representatives at Sofia informed Bulgaria, October 29, that their governments approve. Bulgaria replied, October 29, acceding to the recommendations.

29 NETHERLANDS—PORTUGAL. Ratifications exchanged at The Hague of treaty signed at The Hague October 1, 1904, fixing boundary

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of their possessions on the island of Timor. *Nederlandische Staatscourant*, No. 257.

29 NETHERLANDS—PORTUGAL. Ratifications exchanged at The Hague of treaty signed at The Hague October 1, 1904. *Nederlandische Staatscourant*, No. 257; *Staatsb.*, 1906, No. 18. Arbitration.

30 CHINA—FRANCE. Chinese imperial decree respecting fracas between Chinese and French soldiers in Tonkin in June, 1908, which resulted in the loss of several French lives. Punishment of Chinese officers, *North China Herald*, November 7. China pays $100,000 indemnity, together with the assessed damage to the Yunnan railway. She will also renew the mining rights and allow an extension of the railway to Sianfu.

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1 ABYSSINIA. Adhesion to universal postal union takes effect.

2 INDIA. Imperial message to the princes and peoples of India granting amnesty to prisoners and greater political rights to the native population, read by the viceroy in durbar at Jodhpur. Text of this message and of Queen Victoria's proclamation of November 1, 1858, transferring the government of India from the East India Company to the Crown, in *Times*, November 2, 1908. *North American R.*, 188:938; *Hubbard: The English in India, Atlantic Monthly*, 101:835; *Keene: The conflict of civilizations in India, Nineteenth Century*, 63:1022; *Parliamentary government and our Indian empire, Spectator*, July 4; *Times*, April 11; *Marchand: Le problème indien et les troubles de la frontière indo-afghane, Q. dipl.*, 25:757; *The unrest in India, Quarterly R.*, 209:216; *Mitra: Indian problems*, London, 1908; *Sunderland: The new nationalist movement in India, Atlantic Monthly*, 102:526; *Nisbet: India under crown government, 1858–1908, Nineteenth Century*, 64:786; *Cox: Danger in India, Nineteenth Century*, 64:941; *Tupper: Indian sedition, National R.*, 52:572; *Rees: India in parliament in 1908, Fortnightly R.*, 84:937; *Leygues: Le problème asiatique, Nouvelle R.*, 6:289; *Times*, October 31, November 2; *Cd.*, 3912, 4426, 4435, 4436; *Spectator*, December 26. *See September 7, 1907.*

3 BELGIUM. Royal decree, under authority of articles 29 and 66 of the constitution, organizing the new ministry of colonies and pre-

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scribing rules and regulations therefor. *Monit.*, November 4; *Arch. dipl.*, 107:338.

4 BELGIUM—KONGO. Belgian decree naming November 15, 1908, the date on which Belgium will extend her sovereignty over Kongo. Under article 4 of treaty of cession signed November 28, 1907. *Monit.*, November 5; *B. officiel de l'Etat independant du Congo*, October, 1908; *Times*, December 23; *Arch. dipl.*, 107:349. *See October 18 and November 3, 1908.*

4 INTERNATIONAL. Monetary convention signed, additional to the convention signed at Paris, November 6, 1885. The first clause provides that from the date of promulgation of the convention the amount of silver coin allowed for each country of the union shall be raised to 16f. per inhabitant. The Belgian, French, Swiss and Italian governments undertake to withdraw from circulation in their respective territories the Greek silver pieces of 2f., 1f., 50c., and 20c., and to restore them to the Greek government, which will reimburse them with gold. Greece will withdraw all one and two drachma notes, issuing silver instead. *Times*, December 18. The convention was laid before the Greek chamber December 17.

4 HONDURAS—NICARAGUA. Treaty of commerce signed at Tegucigalpa. To take effect the date of exchange of ratifications, and to endure thereafter for ten years and for one year after either contracting party notifies the other of its intention to terminate it.

12 BRAZIL. Decree No. 7,172, proclaiming agreement signed at Rome December 9, 1907, for foundation at Paris of an international office of public hygiene. Brazil's ratification was deposited at Rome October 28, 1908. Takes effect November 15, 1908. *Diario official*, November 12.

12 AUSTRIA—UNITED STATES. Parcel-post convention signed at Washington; signed at Vienna October 9, 1908; ratified by the President November 12, 1908. Takes effect January 1, 1909. *Stat. at L.*, vol. 35.

12 CHINA—JAPAN. Final agreement signed at Peking respecting the Kirin–Kwanchengtze branch of the Japanese South Manchurian Railway. *Times*, November 12. For the preliminary agreement signed at Peking April 15, 1907, see *J. of American Asiatic Assn.*, July, 1907; *North China Herald*, 85:643, and *Official ga.*, Tokyo, May 4, 1907. *See April 15, 1907.*

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13 BULGARIA—GREAT BRITAIN. Procès-verbal signed at Sofia repecting customs duties, supplementary to commercial convention signed at Sofia December 9, 1905. *Treaty ser.*, 1908, Nos. 1 and 32.

13 INTERNATIONAL. Convention signed at Berlin for protection of literary and artistic property.

ART. 25. The States outside of the union which assure legal protection of the rights which are the object of the present convention may accede to it upon their request.

This accession shall be made known in writing to the Government of the Swiss Confederation and by the latter to all the others.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages stipulated in the present convention. It may, however, indicate such provisions of the convention of September 9, 1886, or of the additional act of May 4, 1896, as it may be judged necessary to substitute provisionally, at least, for the corresponding provisions of the present convention.

ART. 26. The contracting countries have the right to accede at any time to the present convention for their colonies or foreign possessions.

They may, for that purpose, either make a general declaration by which all their colonies or possessions are included in the accession, or name expressly those which are included therein, or confine themselves to indicating those which are excluded from it.

This declaration shall be made known in writing to the Government of the Swiss Confederation, and by the latter to all the others.

ART. 27. The present convention shall replace, in the relations between the contracting States, the convention of Berne of September 9, 1886, including the additional article and the final protocol of the same day, as well as the additional act and the interpretative declaration of May 4, 1896. The conventional acts above mentioned shall remain in force in the relations with the States which do not ratify the present convention.

The States signatory to the present convention may, at the time of the exchange of ratifications, declare that they intend, upon such or such point, still to remain bound by the provisions of the conventions to which they have previously subscribed.

ART. 28. The present convention shall be ratified, and the ratifications shall be exchanged at Berlin, not later than the 1st of July, 1910. * * *

Signed by Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, Japan, Liberia, Luxemburg, Monaco, Norway, Sweden, Switzerland, Tunis. Text in *Dr. d'auteur*, 21:141, and *J. des débats*, November 19; *Dr. d'auteur*, 21:146. Conformably

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to usage, the German government had invited to the conference the powers that do not belong to the Union. Delegates were sent by Argentine Republic, Chili, China, Colombia, Ecuador, United States, Greece, Guatemala, Mexico, Nicaragua, Netherlands, Peru, Persia, Portugal, Roumania, Russia, Siam, Uruguay, Venezuela. *Mém. dipl.*, November 22. *See September 16, 1908. Delzons: L'œuvre de la conférence de Berlin sur la propriété littéraire et artistique, R. des deux mondes,* 48:895; U. S. H. R. Doc., 1208, 60 Congress; for statement of international copyright relations of the United States, see Circulars Nos. 38 and 39 of the Copyright office, Library of Congress.

13 CHINA. Decree of the emperor in compliance with the command of the empress dowager appointing Prince Ch'un regent and ordering that Pu Yi (son of Prince Ch'un) be brought to the palace where he will be educated. *North China Herald,* November 21. Prince Ch'un is the third son of the late Prince Ch'un who had five sons. The eldest is dead; the second was Emperor Kuang Hsü. Prince Ch'un succeeded to his father's title in January, 1891. Prince Pu Yi was born February 11, 1906. *See November 14.*

14 FRANCE—GERMANY. Exchange of notes at Berlin declaring accession of German protectorates to the international copyright convention signed September 9, 1886, to apply also to the Franco-German copyright convention signed at Paris April 8, 1907. *Reichs-G.,* 1908, No. 57. The accession of the German protectorates takes effect January 1, 1909. *Dr. d'auteur,* 21:157.

14 CUBA. General election for president for term ending May 20, 1913. By virtue of Decree No. 900 of September 12, 1908, and in accordance with Decree No. 899, reenacting in revised and corrected form the electoral law of April 1, 1908, and its amendment, Decree No. 1,054. The electoral college on December 24 (Decree No. 1121, *Ga. oficial,* December 1) chose José Miguel Gomez president. Municipal and provincial elections had been held August 1, 1908. *Ga. oficial,* September 11, October 30, November 11. *Informe de la administracion provisional, desde 13 octubre 1906 hasta el 1° de diciembre de 1907 por Charles E. Magoon, gobernador provisional,* Habana, 1908; *Conditions in Cuba, Nation,* 86:346.

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14 CHINA. (1) Valedictory manifesto of Emperor Kuang Hsü. (2) Decree in the name of the empress dowager announcing death of Kuang-Hsü. (3) Decree in name of the empress dowager commanding that Pu Yi be adopted as the son of Kuang Hsü, and to enter upon the inheritance of the dynastic line as emperor by succession. (4) Decree in the name of the empress dowager stating that the Prince Regent shall govern until the emperor fulfils the period of his education. (5) Inaugural decree of the emperor in compliance with the command of the empress dowager stating that Kuang Hsü died this date and prescribing mourning. (6) Decree making the empress dowager, empress grand dowager and the empress (widow of Kuang Hsü) empress dowager. *North China Herald,* November 21. Tsai-t'ien, born August 2, 1872, son of Yi-huan Prince Ch'un, who was seventh son of the Emperor Tao-kuang and brother of the Emperor Hsien-fêng, succeeded to throne under title of Kuang-Hsü, 1875. *Vay de Vaya and Luskod: Empires and emperors of Russia, China, Korea, and Japan,* New York, 1906.

14 PORTUGAL—UNITED STATES. Ratifications exchanged at Washington of treaty of naturalization signed at Washingtion May 7, 1908. Ratification advised by the Senate, May 14, 1908; ratified by Portugal, September 21, 1908; ratified by the President, November 6, 1908; proclaimed by the President, December 14, 1908. *U. S. Treaty ser.,* No. 513; *Stat. at L.,* vol. 35; *Diario do Governo,* December 14.

14 PORTUGAL—UNITED STATES. Ratifications exchanged at Washington of treaty of general arbitration signed at Washington April 6, 1908. Ratification advised by the Senate, April 17, 1908; ratified by Portugal, September 21, 1908; ratified by the President, November 6, 1908; proclaimed by the President, December 14, 1908. *U. S. Treaty ser.,* No. 514; *Stat. at L.,* vol. 35. Term, five years from date of exchange of ratifications. *Diario do Governo,* December 14.

14 PORTUGAL—UNITED STATES. Ratifications exchanged at Washington of treaty of extradition signed at Washington May 7, 1908. Ratification advised by the Senate, May 22, 1908; ratified by Portugal, September 21, 1908; ratified by the President, October 26, 1908; proclaimed by the President, December 14, 1908. *U.*

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S. Treaty ser., No. 512. No person charged with crime shall be extraditable from Portugal upon whom the death penalty can be inflicted for the offense charged by the laws of the jurisdiction in which the charge is pending. *Stat. at L.*, vol. 35; *Diario do Governo*, December 14.

15 CHINA. (1) Valedictory manifesto of the empress grand dowager. (2) Imperial edict announcing death of empress grand dowager this date. *North China Herald*, November 21; *Payen: La mort des souverains chinois, Q. dipl.*, 26:669. Tzu-hsi, born November 17, 1834, was mother of the Emperor T'ung-chih, the predecessor of Kuang-hsü. Tzu-hsi was maternal aunt of Kuang-hsü. *Carl: With the empress-dowager of China*, London, 1906; *id.*, New York, 1905; *id., Century*, 70:803; *China and the new era, Spectator*, November 21; *Blake: The rule of the empress dowager, Nineteenth century*, 64:990; *Dillon: The late empress of China, Fortnightly R.*, 85:19; *Times*, December 29.

17 UNITED STATES. Proclamation of arrangement signed at Rome, December 9, 1907, for the establishment of The International Office of Public Health. Ratification advised by the Senate, February 10, 1908; ratified by the President, February 15, 1908. *U. S. Treaty series*, No. 511. *See July 5, 1908.* The main object of the office is to collect and bring to the knowledge of the participating States facts and documents of a general character concerning public health and especially regarding infectious diseases, notably cholera, plague, and yellow fever, as well as the measures taken to check these diseases. Each State is allowed a number of votes in the government of the office inversely proportioned to the number of the class to which it belongs as regards its participation in the expenses of the office.

19 PERSIA. Rescript issued declaring that a mejliss would not be convoked. This rescript was recalled owing to representations made to the Shah by the British and Russian legations November 22. For an account of the principal events of November at Teheran, see *Times*, December 22; *J. des debats*, November 26; *Spectator*, November 28. On December 2 the Shah sent a message to the British minister that he was resolved to keep the promise given in his decree of October 2 and convoke a mejliss suited to the needs of the country and in accordance with Mohammedan law.

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25 MOROCCO. Mulai Hafid proclaimed Sultan at Casablanca. *J. des debats,* November 26.

25 FRANCE—GERMANY. Compromis of arbitration of the Casablanca incident signed at Berlin. The members of the tribunal will be taken from the members of The Hague arbitral court, and except as to the points specified in the present compromis, the disposition of the convention of October 18, 1907, for pacific adjustment of international disputes will be applicable. The arbitral court will meet May 1, 1909, at The Hague. *J. des debats,* November 12 and 26; *Times,* November 25; *Q. dipl.,* 26:443.

26 BULGARIA—GREAT BRITAIN. Expiration of period for notification of accessions of British colonies to the treaty of friendship, commerce and navigation signed at Sofia December 9, 1905 (*Treaty ser.,* 1908, No. 1), under Article XX thereof. The colonies which have acceded are: Bahamas, Barbados, Basutoland, Bechuanaland Protectorate, Bermuda, British Guiana, British Honduras, Ceylon, Cyprus, East Africa Protectorate, Falkland Islands, Federated Malay States (Perak, Selangor, Negri Sembilan, Pahang), Fiji, Gambia, Gilbert and Ellice Islands Protectorate, Gold Coast, Grenada, Hong Kong, Jamaica (Turks Islands, Cayman Islands), Leeward Islands (Antigua, Montserrat, Saint Christopher-Nevis, Virgin Islands, Dominica), Malta, Mauritius, Northern Nigeria, Nyasaland Protectorate, Saint Helena, Saint Lucia, Saint Vincent, Seychelles, Sierra Leone, Solomon Islands Protectorate, Somaliland Protectorate, Southern Nigeria, Southern Rhodesia, Straits Settlements, including Labuan, Trinidad and Tobago, Uganda Protectorate, Wei-hai-Wei. *Treaty ser.,* 1908, No. 31.

27 INTERNATIONAL INSTITUTE OF AGRICULTURE held its first general meeting at Rome. *Times,* November 28.

30 FRANCE—GREAT BRITAIN. Ratifications exchanged at London of convention signed at London January 25, 1908, respecting exchange of post office money orders between France and the Transvaal. *Treaty ser.,* 1908 No. 33.

30 JAPAN—UNITED STATES. Notes exchanged at Washington declaring policy in the far East. *Brooks: Aspects of the American-Japanese agreement, Independent,* 65:1554.

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1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.

2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned, and to the defense of the principle of equal opportunity for commerce and industry in China.

3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.

4. They are also determined to preserve the common interests of all powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.

5. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.

30 GERMANY—PORTUGAL. Treaty of commerce signed at Oporto. *J. des débats,* December 2; *Times,* December 2, 28. *See August 26, 1908.*

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES [1]

Consular officers, Digest of circular instructions to, January 1, 1897–May 25, 1908. Compiled by Augustus E. Ingram. 153 p. *Dept. of state.*

Extracts from the revised statutes and the statutes at large relating to the Department of State, diplomatic and consular service, and foreign relations. 1908. 150 p. *Dept. of state.*

France, Parcel-post convention between United States and. 1908. 16 p. *Post-office dept.*

Immigration laws and regulations of July 1, 1907. 5th edition. October 5, 1908. 86 p. *Bureau of immigration and naturalization.* Paper, 10c.

Japan, Convention between the United States and. Arbitration. Signed at Washington May 5, 1908; proclaimed September 1, 1908. 4 p. *Dept. of state.*

Naturalization. Convention between the United States and Salvador. Signed at San Salvador March 14, 1908; proclaimed July 23, 1908. 6 p. *Dept. of state.*

Naturalization laws and regulations, September 1, 1908. 28 p. *Bureau of immigration and naturalization.* 5c.

Netherlands, Commercial agreement between the United States and, under sec. 3, tariff act, July 24, 1897. Signed at Washington May 16, 1907; proclaimed August 12, 1908. 7 p. *Dept. of state.*

Netherlands, Reciprocity between the United States and the. August 13, 1908. 3 p. *Treasury dept.* (Dept. circular 64.)

Newfoundland fisheries. Agreement effected by exchange of notes between the United States and Great Britain. Signed at London July 15–23, 1908. 5 p. *Dept. of state.*

Santo Domingo, Report on the debt of, submitted to the President of the United States by Jacob H. Hollander, special commisioner. 1905. 250 p. (S. confidential ex. doc. 1, 59th Cong., 1st sess.)

[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Sweden, Convention between the United States and. Arbitration. Signed at Washington May 2, 1908; proclaimed September 1, 1908. 5 p. *Dept. of state.*

Trade-marks, etc., in China, Treaty between the United States and Japan, protection of. Signed at Washington May 19, 1908; proclaimed August 11, 1908. 5 p. *Dept. of state.*

Trade-marks, etc., in Korea, Treaty between the United States and Japan, protection of. Signed at Washington May 19, 1908; proclaimed August 11, 1908. 5 p. *Dept. of state.*

GREAT BRITAIN [2]

British and foreign state papers. 1903–1904. Vol. 97. *Foreign office.* 10s.

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PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

ANNIE B. MASON V. INTERCOLONIAL RAILWAY OF CANADA AND TRUSTEES

197 Massachusetts Reports, 349

(February 26, 1908)

Tort for personal injuries received by the plaintiff while a passenger on the Intercolonial Railway of Canada at Moncton, New Brunswick. Writ in the Superior Court for the County of Suffolk, dated January 18, 1907.

Several corporations and one individual were summoned as trustees, who answered that they had in their possession effects and credits belonging to the Intercolonial Railway, which they would hold subject to the process served upon them if the court should be of opinion that it had jurisdiction to entertain the action. In each answer was included a copy of a letter of Messrs. Russell and Russell to the trustees stating that the funds held by the trustees to the credit of the Intercolonial Railway were "funds of the British Government and therefore in no way attachable or subject to detention by process of any court in this country."

KNOWLTON, C. J.:

This is an action brought by a trustee process to recover damages for personal injuries. The defendant has not appeared, but a member of our bar, as a friend of the court, following the practice approved by Chief Justice Marshall in Osborn v. United States Bank, 9 Wheat., 738, 870, has brought before the court a suggestion that the action be dismissed, and also an affidavit of the deputy of the minister of justice and attorney-general of Canada, including a copy of the "act respecting government railways," from which it appears that the so-called defendant, the Intercolonial Railway of Canada, is the property of His Majesty Edward VII, King of the United Kingdom of Great Britain and Ireland, in the right of his Dominion of Canada, and is not a corporation. The truth of the matters thus shown to the court is not questioned. It appears that no subject, private individual, or corporation has any

interest or concern by way of property or direction in the ownership or working of the Intercolonial Railway, but that it is owned and operated by the King, through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. Such moneys, when collected, are deposited to the credit of the minister of finance and register-general of Canada, and carried to the credit of the consolidated revenue fund, which fund is appropriated to the public debt and service of Canada. The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. See also The Queen v. McLeod, 8 Canada Supreme Court, 1, 23.

Upon this suggestion the question at once arises whether the court has jurisdiction of a suit which is virtually against the King of a foreign country. An answer in the negative comes almost as quickly.

The general subject of the immunity of the sovereign power from the jurisdiction of its own court was considered and discussed at great length by Mr. Justice Gray, in Briggs v. Lightboats, 11 Allen, 157, and, after an exhaustive review of the authorities, it was held that the action could not be maintained because the lightboats were the property of the United States, a sovereign power. Incidentally the question whether the public property of a foreign sovereign is exempt from the jurisdiction of the courts was discussed, and the cases bearing upon the question were reviewed. In the opinion, on page 186, we find this sentence, which is pertinent to the present case:

> **The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character.**

In *Schooner Exchange* v. M'Faddon, 7 Cranch, 116, Chief Justice Marshall gives a very clearly reasoned statement of the principles which

control the courts in their decisions that they have no jurisdiction over a sovereign of a foreign state who comes within their precincts. The decision was that the courts of the United States had no jurisdiction over a public armed vessel in the service of a sovereign of another country at peace with the United States. At page 137 we find this statement of a reason for the law that governs such cases:

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another state is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign. It was clearly laid down and applied in the cases of Wadsworth v. Queen of Spain, Q. B. 171, and DeHaber v. Queen of Portugal, 17 Q. B. 171, 196. It was again applied in *The Constitution,* L. R. 4 P. D. 39, and also in *The Parlement Belge,* L. R. 5 P. D. 197, where an elaborate review of the decisions is given by Brett, L. J., who says on page 214:

> The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

In Vavasseur v. Krupp, 9 Ch. D. 351, 361, Lord Justice Cotton sums up the law as follows:

> This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the state of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented by the individual who is the sovereign.

In Young v. *The Scotia* [1903], A. C., 501,[1] there is an elaborate discussion of the exemption of public property from process of the courts of its own sovereignty. The doctrine was applied to a claim for salvage of a public vessel which was used by the Canadian government as a ferry boat, in connection with a line of railway and as a part of the general means of transportation, just as cars are used on the Intercolonial Railway. See also the very recent case of *The Jassy*, 75 L. J. P. D. & A. 93, where the principle suggested for our guidance was applied to a vessel which was the property of the King of Roumania.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in which she received her injury, where there is a statutory provision for such cases.

Action dismissed.

THE SCHOONER "EXCHANGE" v. M'FADDON ET AL.

Supreme Court of the United States, 1812
7 Cranch, 116

[NOTE. — In view of the fact that Chief Justice Marshall's opinion in The Schooner *Exchange* v. McFaddon et al. is the leading authority on the immunity of foreign sovereigns from suit in national courts, it has been deemed advisable to print it in connection with the decision in the case of Annie B. Mason v. Intercolonial Railway of Canada and Trustees, in order that the reader may have at his disposal the literature on the subject.]

Appeal from the sentence of the circuit court of the United States for the district of Pennsylvania.

The schooner *Exchange*, owned by John M'Faddon and William Greetham, sailed from Baltimore, October 27, 1809, for St. Sebastians, in Spain. On the 30th of December, 1810, she was seized by the order of Napoleon Bonaparte; and was then armed and commissioned as a public vessel of the French government, under the name of *Balaou*. On a voyage to the West Indies, she put into the port of Philadelphia, in

[1] Where a ship is the property of the Crown, no action *in rem* or otherwise for salvage can be maintained The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute. — *Headnote*, Young v. *The Scotia*, A. C. 501 (1903).

July, 1811, and on the 24th of August was libelled by the original owners. As no claimant appeared, Mr. Dallas, the attorney of the United States for the district of Pennsylvania, filed (at the suggestion of the executive department of the United States, it is believed) a suggestion that inasmuch as there was peace between France and the United States, the public vessels of the former may enter into the ports and harbors of the latter and depart at will without seizure or detention in any way.

The district judge dismissed the libel, on the ground that a public armed vessel of a foreign power, at peace with the United States, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which the foreign sovereign claims to hold her.

The libellants appealed to the circuit court, where the sentence was reversed — from the sentence of reversal, the district attorney appealed to this court.

MARSHALL, C. J.:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States?

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory, with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer can not be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection,

that the license has been obtained. The character to whom it is given, and the object for which it is granted equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be, because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction, suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory: he is supposed to assent to it.

This consent is not expressed. It is true, that in some countries, and in this, among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity, by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, can not intend to subject his minister in any degree to that power; and therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal

intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be, because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration, that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be, in like manner conferred by such general permit. We have seen, that a license to pass through a

territory implies immunities not expressed, and it is material to inquire, why the license itself may not be presumed?

It is obvious, that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act, not absolutely hostile in its character or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these, that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privileges by its irregular and improper conduct. It may, however, well be questioned, whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers, often, indeed, generally, attending it, do not ensue from admitting a ship of war, without a special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation, generally, or any particular ports, be closed against vessels of war, generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect, in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty bids him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted,

any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the court, for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject, a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

These treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port, under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade, who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly, with much plausibility, if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted, that private ships entering without special license become subject to the local jurisdiction, it is demanded, on what authority an exception is made in favor of ships of war?

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily, and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudiced.

Without deciding how far such stipulations in favor of distressed ves-

sels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed, that his sovereign means to subject him to the authority of the prince to whom he is sent; the latter, in receiving the minister, consents to admit him on the footing of independency; and thus, there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this can not be presumed, the sovereign of the port must be considered as having conceded the privilege, to the extent in which it must have been understood to be asked.

To the court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it, must be supposed to act.

When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the

government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption. But in all respects different, is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference can not take place, without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained, that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases, in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he can not be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing, for a debt due from the King of Spain. In that case, the states generally interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships, would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed, as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion, which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth, are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argu-

ment has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the *Exchange* must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is, therefore, said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the *Exchange,* being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

COSME BLANCO HERRERA AND JOSE BLANCO HERRERA, DOING BUSINESS UNDER THE FIRM NAME OF HERRERA NEPHEWS, V. THE UNITED STATES

Court of Claims of the United States

(Decided May 4, 1908)

PEELLE, Ch. J., delivered the opinion of the court:

This action is founded on a claim for the use and damage for the detention of the steamship *San Juan,* owned by Spanish subjects, captured in the port of Santiago, Cuba, during the war with Spain, July, 1898. The seizure was by the Army, and no question of prize is involved.

But for the averment in the petition that the vessel herein was taken possession of by the United States "as private property and without any claim of title by reason of capture, or confiscation, or forfeiture," and used for lawful governmental purposes, the question of the liability of the United States might perhaps have been determined under rules 37 and 92 before either party had incurred expense in the taking of testimony.

This case is ruled by that of Hijo v. The United States (194 U. S. R., 315, 320), unless excepted therefrom by reason of the relation of the United States to Cuba. That case, like the one here, was for the capture, use, and damage for detention of a vessel, owned by Spanish subjects, in the port of Ponce, P. R., at the time of the capture and surrender of that port and city in July, 1898, to the naval and military forces of the United States.

There, as here, the vessel was used or detained by the military forces under the orders of the Quartermaster's Department of the Army until April, 1899, when the vessel, as here, was returned to the owners on condition that all claims for use or damage for detention should be waived, which was done.

In each case the vessel captured was owned by Spanish subjects, and the capture, use, and detention of the vessel occurred during the war with Spain, which war, says the court in the case cited, "did not in law cease until the ratification in April, 1899, of the treaty of peace."

In that case the contention was that the claim arose out of an implied contract, and that an action could be maintained thereon under section 1 of the act of March 3, 1887, commonly known as the Tucker Act. (24 Stat. L., 505.) But in response to that contention the court, by Mr. Justice Harlan, said:

> The present suit finds no sanction in the above act, even if the plaintiff were not a foreign corporation. Its claim is not founded on the Constitution of the United States, or on any act of Congress, or on any regulation of an Executive Department. Nor can it be said to be founded on contract, express or implied. There is no element of contract in the case, for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and not for any purposes of gain. * * * The seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations. The

action, in its essence, is for the recovery of damages, but, as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. "A truce or suspension of armies," says Kent, "does not terminate the war, but it is one of the *commercia belli* which suspends its operations. * * * At the expiration of the truce hostilities may recommence without any fresh declaration of war." (1 Kent, 159, 161.) If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. Besides, the treaty of peace between the two countries provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle all claims of its citizens against Spain relinquished in this article." This stipulation clearly embraces the claim of the plaintiff — its claim against the United States for indemnity having arisen prior to the exchange of ratifications of the treaty of peace with Spain.

We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty — each being equally the supreme law of the land — the one last in date must prevail in the courts. (The Cherokee Tobacco, 11 Wall., 616, 621; Whitney v. Robertson, 124 U. S., 190, 194; United States v. Lee Yen Tai, 185 U. S., 213, 221.)

We have thus quoted from that case at length because the ruling and language in that case cover the present case completely, unless excepted therefrom by reason of the peculiar relation of the United States to Cuba, and as to that let us now inquire.

It must be borne in mind that at the time of the capture and use of the vessel in question Cuba was under the dominion and sovereignty of Spain, and so remained until relinquished by the terms of the treaty of Paris, when, on December 13, 1898, the United States, pursuant to the terms of that treaty, entered into the occupancy of said island and established therein a military government and maintained the same under the direction of the President as Commander in Chief of the Army and Navy of the United States until May, 1902, when the government and control of the island were transferred to the President and Congress of the Republic of Cuba.

Even if it should be conceded that the surrender of the port and city of Santiago to the military and naval forces of the United States in July, 1898, carried with it the sovereignty of the United States over that particular district, still by the protocol of August 12, 1898, the United States in effect conceded the sovereignty of Spain over the island. The protocol — a basis for the establishment of peace — which in terms suspended hostilities between the two countries, did not operate either to suspend or terminate the sovereignty of Spain over Cuba. By article V thereof provision was made for the appointment of commissioners to meet at Paris not later than October 1, 1898, to treat of peace; and it was not until by article I of the Treaty of Paris of December 10, 1898, that Spain relinquished "all claim of sovereignty over and title to Cuba." Hence the United States thereby recognized the sovereignty and authority of Spain over Cuba until terminated by the treaty; and though for some purposes the military authorities of the United States had prior thereto exercised dominion over particular parts of the territory acquired by conquest, the island nevertheless was foreign territory, held in trust by the United States for the inhabitants thereof. The conquest was not with the intention of holding or taking title to the island or any part thereof, as had previously been declared by the joint resolution of Congress.

In other words, "during the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operations, or express provisions, extinguishes his title forever" (Sec. 545 Wheaton's International Law and authorities there cited). Here, while by the treaty the sovereignty of Spain was relinquished, it was not transferred to the United States, so that the authority of the United States over the island or any district thereof was, as expressed in said joint resolution, only "for the pacification thereof."

In the case of Neely v. Henkel (180 U. S., 109, 120) the court, after reviewing the objects intended to be accomplished by the war with Spain and the military occupation thereof as disclosed by public acts and official documents, said:

> Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy

of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

But the contention of the claimants is that their action is based on the Executive order of the President of July 13, 1898, which was promulgated by the Secretary of War in General Order No. 101, July 18, 1898, providing, among other things, as follows:

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained. * * *

Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation; and when payment in cash is not possible receipts are to be given.

The contention is that the order of the President so promulgated is a regulation of the War Department, and that, therefore, they are entitled to maintain their action thereon under section 1, act of 1887. But this question, we think, is fully met by the ruling in the case of Hijo v. The United States, *supra* — that is to say, "the seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898." And this, we think, applies with equal force to Cuba as to Porto Rico, as the vessel captured was owned by Spanish subjects, natives of Spain, residing in Cuba. Native Spaniards who were Spanish subjects residing in Cuba during said war were enemies, and their property was entitled to no more protection from the United States than other Spanish subjects, and particularly when, as in the present case, the vessel prior to its capture had been used in transporting Spanish

troops, munitions of war, and supplies for the Spanish troops from place to place.

While the military and naval forces of the United States were enjoined by the Executive order to respect "private property, whether belonging to individuals or corporations," it also authorized the confiscation of such property for cause. Besides, the same order authorized the seizure, by the military occupant, of the means of transportation, including "telegraph lines and cables, railways and boats," although such property belonged to private individuals or corporations. True, when so seized the order directed the return of such property "unless destroyed under military necessity."

The Government, in the present case, elected to return the vessel instead of destroying it, but the return thereof is an argument in favor of the generosity of the Government and not a confession that the seizure was not an act of war.

But it is contended that the joint resolution of Congress respecting the independence of the people of Cuba and the relinquishment of Spanish authority in the island, coupled with the disclaimer on the part of the United States to exercise sovereignty, jurisdiction, or control over said island — other than for the pacification thereof — operated to constitute the people of Cuba an ally to force Spain to relinquish her authority and control in said island, thereby segregating from Spanish territory as enemy's country said island.

And from official documents as well as from the history of the time, of which the court takes judicial notice, the insurrectionists in said island against the Government of Spain did cooperate with the military forces of the United States in liberating Cuba from Spanish control. But the island was nevertheless under the sovereignty and control of Spain during the capture and use of the vessel in question, which capture and use were held by the executive department of the Government as a military necessity arising in the belligerent prosecution of the war, and for that reason the Department denied to the claimants herein any compensation therefor.

What the United States did to establish and maintain the freedom and independence of Cuba was voluntarily undertaken and done; and in the execution of the purpose of the joint resolutions it was the judgment of the President, charged therewith, that the capture of the vessel and its use for the military and humane purposes set forth in the findings were for purposes of war and not for gain. In this view of the case

individual rights must give way to the rights of the people of Cuba, for whose independence the United States intervened and for whose benefit the island was later held in trust.

But if we should assume that because of the acts of the United States the island was not enemy's country and the claimants, by reason of their residence in Cuba, were not enemies, still the court would be confronted with Article VII of the treaty of Paris, which provided that "the United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war."

The claimants herein were not only Spanish subjects, but were natives of Spain, so that whatever claim may have accrued to them against the United States during said war was relinquished in the treaty by the act of Spain.

Nor do we deem it material in the present case to consider the difference between native Cubans as subjects of Spain and natives of Spain who were subjects thereof residing in Cuba, for it is clear that whatever claim the subjects of Spain had against the United States from the date of the insurrection in Cuba to the date of the exchange of ratifications of the treaty were relinquished; and while the United States by Article VII of the treaty agreed to "adjudicate and settle the claims of its citizens against Spain," thereby protecting Spain against the claims of any citizen of the United States, Spain did not obligate itself by the treaty to pay the claims of her subjects against the United States which she had relinquished, but we do not see that this is material or that it in any way strengthens the claimants' right to recover for the use or damages for the detention of their vessel. By the act of Spain the United States were released from the payment of such claims, and they can not now be asserted against the United States.

True, within the time prescribed by Article IX of the treaty the claimants renounced their allegiance to Spain, and thereby adopted the nationality of Cuba; but that was long after the capture, use, and detention of the vessel and after the return thereof to the claimants, as set forth in the findings.

We deem it unnecessary to enter upon a discussion of the circumstances under which the vessel was restored to the claimants further than

to say that no right to recover for the use and detention of the vessel can be predicated on the action of the War Department in requiring the claimants to accept the return of their vessel under the circumstances of this case, for even if the claimants had been permitted to receive the vessel under protest, reserving in the receipt in express terms their right to prosecute a claim for the use and detention of the vessel, it would have availed them nothing, as there was no element of contract either in the capture, use, or detention of the vessel, nor was anything said by the officers of the Government from which there could be implied an agreement or obligation to pay therefor, and the claim being one sounding in tort no action will lie thereon against the United States on the order of the President.

For these reasons the numerous cases cited by the claimants, to the effect that where the Government appropriates private property which it does not claim as its own it does so under an implied contract to pay therefor, have no application in this case. Nor has the case of the Philippine Sugar Estates Development Company (40 C. Cls. R., 33), for the reason that at the time of the taking of the property in that case war with Spain had ceased; the Philippine Islands had been ceded to and were under the control and dominion of the United States; the country had been reduced to subjection before the taking of the property, and hence it was held that an implied contract arose to pay for the property so taken. But that is not the case here, as the capture and use of the vessel were both during the war with Spain, and even before the occupation of Cuba by the military forces of the United States.

Although we have reached the conclusion that the case of Hijo v. The United States, *supra*, is controlling in the present case, notwithstanding the peculiar relation of the United States to Cuba, we have found the facts on the merits of the case for the reason that in the case just cited the court, in concluding its opinion, said:

> We may add that even if the act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail, for it is well settled that in case of a conflict between an act of Congress and a treaty — each being equally the supreme law of the land — the one last in date must prevail in the courts.

So that if, in case of appeal, the Supreme Court should differ with this court and hold that an action could be maintained under the act of March, 1887, they would then have before them the question whether the treaty, as in that case, operated to relinquish the claim herein.

For the reasons we have given we must hold that the court is without jurisdiction; and we may add that if we should take jurisdiction, we should feel constrained under the wording of the treaty to apply it in this case, so that in either event the claimants must fail; and for that reason their petition is dismissed.

PASCASIO DIAZ, ENRIQUE DE MESSA, AND ROBERT SCOTT DOUGLAS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF GALLEGO, MESSA & COMPANY, V. THE UNITED STATES

Court of Claims of the United States

(Decided May 4, 1908)

Per curiam.

The facts in this case are practically the same as those in the case of Cosme Blanco Herrera et al. v. The United States (43 C. Cls. R., —), decided contemporaneously with this; and the decision in that case controls this unless the use of the wharves and the citizenship of one of the claimants herein — a British subject — operates to vary the rules announced therein.

The wharves, as well as the steamship *Thomas Brooks*, were seized and used by the military forces of the United States as an act of war within the limits of military operations, and, therefore, under the ruling in the case of Hijo v. The United States (194 U. S., 315), as applied to captures in Cuba by the ruling in the case of Cosme Blanco Herrera, *supra*, no action will lie therefor against the United States.

Two of the claimants herein were subjects of Spain, while one, Robert Scott Douglas, was a British subject. But a foreigner residing in a state of war with another state is subject to the jurisdiction and control of the state wherein he resides and does business, and his property being an element of strength to the state wherein he resides "may reasonably be treated as hostile by an enemy." That is to say, "enemy character may thus attach either to persons of neutral national character, and to their property as attendant on them, or to property owned by neutrals in virtue of its origin, or of the use to which it is applied." (Hall's Int. Law, 5th ed., p. 497.)

Such also was the view of this court in the case of The Juragua Iron Co. v. The United States (42 C. Cls. R., 99, 111), where the court said:

The law seems to be well settled that when a citizen of one belligerent country is doing business in the other belligerent country, and has built up and purchased property there which has a permanent situs, such property is subject to the same treatment as property of the enemy. At first sight this rule of law seems to be a harsh one, but when we consider that the property therein situated is a part of the assets of a country, and in a certain sense a part of the country itself, and further consider the difficulty, in stress of war, of discriminating between enemy and citizen property situated in the same country, the rule seems to be reasonable and necessary.

In the present case the findings show that the vessel prior to its seizure by the United States military forces had been employed in the transportation of Spanish troops and munitions of war from place to place.

Had the vessel been owned exclusively by said Douglas — the British subject — its use in transporting troops and munitions of war for the Spanish Government, however innocent the owner's intention, would have been service to a state engaged in active hostilities against the United States. But for the purposes of this case we deem it unnecessary to hold that he had thereby forfeited his neutral character; and so, treating him as a neutral individual residing in Cuba, the obligation was upon him to "be prepared for the risks of war;" and that being so, he "can not demand compensation for loss or damage to property resulting from military operations carried on in a legitimate manner." (Hall's Int. Law, sec. 269.)

In this respect he stands in no better position than a subject of Spain.

The petition is dismissed.

BOOK REVIEWS

International Law. Part I: Peace; Part II: War. By John Westlake, K. C., L. L. D., Whewell Professor of International Law in the University of Cambridge, Late Fellow of Trinity College, Cambridge, Honorary L. L. D. of the University of Edinburg, Member and Late President of the Institute of International Law. Published at the University Press, Cambridge, 1904 and 1907. pp. 356 and 334, respectively.

Professor Westlake was born eighty years ago on the 4th of February last and after twenty years of honorable service resigned his professorship at Cambridge last spring, neither mind nor body having failed except that his voice was no longer adequate for lecturing.

After a brilliant career at Cambridge, where he was sixth Wrangler and sixth in first class Classical Tripos, he read law at Lincoln's Inn and was called to the bar in 1854. His first important work, "A Treatise on Private International Law or the Conflict of Laws," was published fifty years ago, in 1858, within four years after his call to the bar, and is now in its fourth edition.

In 1874 he "took silk," and was made a Bencher of Lincoln's Inn. In 1885 he was elected to Parliament from the Romford Division of Essex. In 1894 he published "Chapters on the Principles of International Law." He has been decorated by the Mikado of Japan and the King of Italy. He is especially identified with the foundation and entire existence of the Institute of International Law, and has served as a member for the United Kingdom of the International Court of Arbitration at The Hague.

The ripe productions of such a scholar and specialist in international law certainly deserve notice here.

The preface to the first volume announces that the books "are not intended as an encyclopedia of international law. The aim has been to give a knowledge of the most important topics to English university students and average Englishmen interested in public affairs, neither of them a class which can devote very much time to a single science, and to put them in a position to appreciate the discussion on other topics as they arise in the foreign affairs of the country."

The purpose is much the same as that for which Sir William Blackstone wrote and delivered at Oxford University his "Lectures on the Laws of England," in their final form, just a century and a half ago, except that it is confined to a more limited branch of the law.

The volume on "Peace" deals briefly with a "General view of international law, its sources and principles;" the "Classification of states, their origin, continuity, and extinction;" "Title to state territory and minor territorial rights," "Rivers," "The sea and territorial waters;" with "Nationality and alienage," "National jurisdiction," "Diplomacy," "The political action of states and protection of subjects abroad," "Interoceanic ship canals," and, in an appendix, with the wonderfully expanding topic of "International arbitration."

Perhaps this table of contents is sufficient to show the scope and purpose of this work and, considering that it has been before the public four years, we need not discuss it further, giving the space allowed to the second volume, on "War," so recently published.

The completion of this second volume was delayed until the close of the session of the Second Hague Conference in order to embody its important results as to the law of war, although much of the book was printed at an earlier period. The proceedings at The Hague are dealt with in a closing chapter, but also referred to and incorporated in earlier portions of the book. It ought to be added that Professor Westlake published in the Quarterly Review for January, 1908, an extended, vigorous, and critical review of the works of the Hague conferences, which may be profitably consulted in connection with this work.

Each volume has its own index and the second contains a table of cases, always so desirable in a law book, and so often omitted by less thorough or less lawyer-like writers on international law.

The contents of the second volume are "War and forcible measures short of war" and "Legal relations as affected by war;" the "Laws of war in general;" "The laws of war on land," being the Hague regulations, with a commentary, and such regulations considered generally; "Naval war as between belligerents;" "Neutrality, and duties of neutral states;" "Blockades;" "Contraband of war;" and a chapter covering 61 pages devoted to "The Hague Conference of 1907."

The form of the composition is distinctly that of a university lecturer, defining and seeking to classify his subjects, giving a limited number of references or citations, yet displaying always a full and adequate knowledge, not merely of the commentaries and decisions, but also of the cor-

respondence and official announcements which have settled international law and procedure.

The orderly and lucid marshaling of the facts derived from the very widest historical survey of the subject is a most successful feature of the book, as in the discussion of "The commencement of war between the belligerents," including "Declaration of war" (pages 18 to 26), in which, starting with the rules of Grotius, we see the whole tableau of procedure unrolled down to the communications between the Spanish Government and General Woodford, the United States minister at Madrid, on April 21, 1898, and the ultimatum delivered on behalf of President Krüger to the British agent at Pretoria on October 9, 1899, and the communications between Mr. Kurino, Japanese minister at St. Petersburg, and Count Lamsdorff in 1904.

The clearness, fullness, and succinctness of these statements illustrate a chief merit of the book consistently displayed throughout on the vexed question of "Pacific blockade." Professor Westlake sums up by concluding that "as against the *quasi* enemy it is too well established as a recognized institution to be longer attacked with serious hope of success."

Professor Westlake very stoutly opposes the German doctrine of Lueder and others that the laws of war are liable to be overridden by necessity on the plea "that commanders will act on it, whatever may be laid down." "This ground," he says, "reduces law from a controlling to a registering agency" (see page 115).

This writer is constantly struck by the fullness of knowledge displayed in the thousands of illustrations introduced from actual practice where the incidents, poured in a steady stream of narrative from the well-filled mind of Professor Westlake, give a more complete understanding than standard works which have assumed to discuss the question at some length, as witness the account of the sinking of the British ships at Rouen by the Germans during the Franco-Prussian war (page 118).

In discussing the immunity of coast fisheries from capture he finds evidence of its existence in the Middle Ages in a pleasant passage from Froissart that "fishermen on the sea, whatever war there were between France and England, never did harm to one another, so they are friends and help one another at need."

The book is throughout remarkably free from ill temper or partisanship (so noticeable in Hall's otherwise admirable work), even in the discussion of such tempting topics for acrimony as the taking of Mason

and Slidell from the *Trent,* and that of "continuous voyages," though as to the latter he says:

> In the United States during the civil war the carriage of contraband was generally presented to the courts in connection with blockade running, to which the doctrine of continuous voyages does not apply. The offense of blockade running, consisting in the attempt to communicate with a prohibited port and not in the introduction of a prohibited class of goods, is essentially one of the ships and not an offense of the goods, except as derived from that of the ship.

The reviewer, as a teacher of international law and a humble writer thereon, welcomes Professor Westlake's volumes as wonderfully luminous and, in short space, encyclopedic. He finds in them a happy contrast to those works, so often produced by the publishers with ample advertisements, where an unlearned but assiduous person has been hired to produce, at small cost, a string of citations, animated and guided by no depth of knowledge and no general conception as to the matter in hand. Professor Westlake's *ipse dixit* has more weight than many pages of such hack work. The writer is glad to add that he has recent assurances in personal letters from Professor Westlake that the activities of his pen are to continue, and he ventures to express the hope that the History of International Law which Professor Westlake included in his original plan may follow. No one is better equipped to undertake it. One slight criticism ought to be made. The indexes, as is so often the case in English books — as, for instance, in Phillimore's famous Commentaries — are very much curtailed, quite inadequate, and might, it is submitted, with great advantage in a work whose every page contains so much of value, be greatly expanded.

CHARLES NOBLE GREGORY.

The Elements of International Law, with an Account of its Origin, Sources, and Historical Development. By George B. Davis, Judge-Advocate-General, United States Army, Delegate Plenipotentiary to the Geneva Conference of 1906 and to the Second Peace Conference at The Hague, 1907. Third edition. Revised to date, including the results of the Second Peace Conference at The Hague in 1907, and other new material. Harper & Brothers, publishers: New York and London. 1908.

The first edition of this work appeared in 1887. The second, and last edition before that here considered, was issued in 1903 and contained 612 pages.

The present (third) edition contains 673 pages, a growth of 61 pages in five years.

The general text in the former edition covered 497 and in the last edition but 501 pages, an expansion of 4 pages only. The appendices in the former edition covered 79 pages; in the new edition 138 — an increase of 59 pages — and this increase is more than covered by "Appendix F," containing 70 pages, devoted to some brief introductory remarks concerning and transcripts or abbreviated statements of the agreements of the Second Hague Conference. In a few places these are annotated.

General Davis in his preface says that —

> The labors of the Second Peace Conference were so fruitful of important results and touched the practice of international law at so many points as to make it imperative to recast and amplify the text of several chapters.

He adds further:

> So far as it has been practicable to do so, the text of the present edition has been brought up to date and into harmony with the existing rules governing the relations of sovereign states in both peace and war.

General Davis's book has especial importance as it is the text in international law used at the United States Military Academy at West Point, from which our army officers especially derive their ideas as to the law of nations. It is a limited handbook, quite elementary in its treatment, very general and miscellaneous in many of its citations, and "was originally intended" for "undergraduate students of American colleges and law schools." It formulates the rules of law somewhat more positively, perhaps, than the more ample and advanced works, but adds reference to standard texts for fuller discussion.

The appendix containing the results of the Second Peace Conference is of distinct value and seems absolutely necessary in a text-book intended to be used at the United States Military Academy, since the action of that conference (as ratified) settled or modified numerous rules as to topics of vital importance to army men, as "The opening of hostilities," "The laws and customs of war on land," "Rights and duties of neutral persons," and "Discharging projectiles from balloons," besides quite as extensively regulating the rights and duties of belligerents and neutrals in naval warfare.

The text of the conventions and recommendations can be found much

more amply in many places, as Document No. 444 of the United States Senate, Sixtieth Congress, first session, or in the admirable volume edited by Dr. James Brown Scott of the State Department and published by Messrs. Ginn & Co., 1908, giving the texts of both peace conferences in French, with English translations and related documents, but its presence as an appendix in a convenient and inexpensive handbook of international law is certainly desirable and is ample excuse for the new edition.

It can not be said that the text of the book in general seems to have been revised or adequately brought up to date. There is no table of cases, which omission is felt by one used to law books, but a search of the general index indicates that such an important case as Mortenson v. Peters, decided by the High Court of Justiciary of Scotland (full bench) as to the jurisdiction of Great Britain over the Moray Firth in 1905 (see AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 1, p. 526) has escaped attention. Even such an important and decisive case as *The Paquette Habana, The Lola* (175 U. S., 677), holding in 1899, in one of the late Mr. Justice Gray's cyclopedic opinions, that certain fishing boats are exempt from capture, seems to have escaped citation. The subject is treated on page 61, but this authoritative case is not cited; neither is the provision adopted by the Second Hague Conference to like effect cited in that connection, though of course it is found in the appendix (p. 598). A much more thorough revision of the text and modernization of the citations would certainly have added to the value of this new edition.

Even the index seems not to have been thoroughly revised so as to conform to the very slight change in the pagination, as, for instance, in the index to the new edition we find the title "Fishing boats, exemption from capture, 374, 375, 597." There is nothing on the subject at any one of the three references, but the subject is treated at pages 374 and 375 in the former edition.

A small error is apparent even in the prefaces as printed in the last edition. The preface to the second edition purports to be reprinted. That preface originally contained this passage:

> In the systematic study of the subject it is suggested that Doctor Francis Wharton's exhaustive and invaluable digest of the international law of the United States be habitually used in connection with the excellent volume of cases in international law prepared by the late Prof. Freeman Snow of Harvard University.

Where this is reprinted in the last edition the eulogistic adjectives are very slightly modified, but " Professor John Bassett Moore's valuable and exhaustive digest " is substituted for " Doctor Francis Wharton's exhaustive and invaluable digest,"

As Mr. Moore's digest appeared in 1906, three years after the second edition of General Davis's book, it of course could not have been referred to in the preface in question and a reprint of the preface with such an alteration yet still given as " preface to the second edition " is certainly an error. In the same way the cases by " Dr. James Brown Scott, Solicitor of the Department of State," are mentioned in this reprint of the old preface. Those quite invaluable cases were published in 1902 and might have been very properly referred to in the preface published in 1903, but were not, and moreover Dr. Scott was not Solicitor of the Department of State until 1906, three years after that preface was published. The preface which assumes to be reprinted seems to have been revised and the text which assumes to have been revised seems to have, in the main, been merely reprinted. It may seem ungracious to mention these, perhaps minor, inaccuracies in the work, but they give the impression that the learned and distinguished official whose name gives reputation to the work has, in the pressure of affairs, trusted the revision to a somewhat negligent or hurried assistant and it is hoped these blemishes may disappear from later editions of so widely used a handbook.

CHARLES NOBLE GREGORY.

Treatise on Private International Law. By George Streit. Athens: 1906.

One of the most valuable contributions to private international law published recently is the Greek work of Prof. George S. Streit, of the National University of Greece, which appeared in Athens in 1906.

Modern Greece ever since her independence has striven for the revival of Greek literature, both within and without the narrow boundaries of her territory which were assigned to her by the " protecting powers " of Europe, who contributed to her regeneration. The establishment of the National University of Athens gave a great impetus not only to learning in general, but also to the study of the law, and particularly of the Roman law, which was the law of the land before the Turkish conquest, it being now simply revived. Notwithstanding the existence of a law school at Athens, it is in the European centers of learning, and particu-

larly in those of Germany, that many of the law students of Greece complete their studies and in some cases acquire even all their legal knowledge. Hence, the trend of the minds of some Greek jurists leans toward the German mode of expression, the language used being not the old Attic tongue, but the so-called modern Greek, which is merely Greek in analytical form.

A good many commentaries on the civil law have already been published in Athens, the writers encountering little difficulty in the language question, because they could use the consecrated phraseology of the law books of the Byzantine epoch; but it was not an easy task to write on a new subject, in which it became necessary to coin new legal terms. It was given to the late N. Saripolos of Cyprus to overcome the difficulty by publishing for the first time a treatise in Greek on public international law.

But no book on private international law was up to the present day published in Greek, at least as comprehensive as that written by Prof. G. S. Streit — consisting of five volumes, of which only the first volume has so far been published, which we are now proposing to review.

The work is written in a language as near as possible to the Attic tongue, and any Hellenist may be able to understand it without difficulty. The author being principally trained in the German legal language, he does not seem to have escaped a Teutonic tincture in the mode of expression and generally in the shaping of his legal phraseology.

Coming now to the work itself, one can not but be struck with the erudition and learning of the author and the sound judgment he displays in his criticism of opinions not shared by himself. The quotations from foreign and especially German writers are so copious and so appropriate that one can not but conclude that Professor Streit made the most diligent research in order to make his work as complete as possible, and judging from the first volume it is certain that after the publication of the remaining four volumes it will occupy a prominent position not only in the legal science of Greece, but also in that of other countries.

As the author tells us in the preface of this book, the first volume will be a "dogmatic and historical introduction" to the general work.

This book is divided into three parts, the first being an introduction, the second consisting of a historical review of private international law, and the third dealing with the progress of codification made on the conflict of laws. An appendix containing the various international conventions on this subject and a complete bibliography exhaust the contents of the first volume.

Part I. — In the first part, after criticising the consecrated term of "private international law," which he does not consider as being appropriate, though he adopts it himself as being of universal use, Professor Streit examines the origin or foundation of the conflict of laws, and tells us that the Anglo-American theory of the *comitas gentium,* according to which the judiciary of a state apply in some cases the foreign law, merely by courtesy, has been abandoned as being inconsistent with the modern view of the continental jurists, that in the society of nations the application of foreign law is a legal obligation. The author, after adopting the division of private international law into that of a narrow sense on one hand and broad sense, and subdividing the former into civil and commercial private international law, the latter including that of bankruptcy, of maritime, of bills and notes, and insurance, explains the private international law of procedure and that connected with criminal law.

Professor Streit then tells us that private international law in broad sense consists not only of the conflict of laws, but also of the question concerning the jurisdiction of a state in criminal cases; the assistance to be afforded to a foreign state to bring criminals to justice; and, lastly, the exposition of the rules governing the *status* of aliens. The author adds that his treatise will deal with all of these subjects.

After discussing whether private international law is part of the public or private law, he adopts the opinion of certain writers that it is part of the latter system on account of its intimate connection with states and that it has a tendency to become part of international law proper, though strictly speaking is connected with the internal law of a state.

Professor Streit concludes the first part with an examination of the sources of private international law, and considers that the statutory and customary laws of a country and conventions regulating conflicts of laws, and even some principles of public international law, are the sources of private international law. He does not share the views of certain jurists who consider as sources natural law, legal science, and the law of adjudication. He seems to overlook the importance of judicial decisions in the countries where the English common law is in force, and his statement that the law of adjudication can not be considered as a source of law, even in municipal law, because the courts merely expound existing laws, does not certainly apply to the Anglo-American system of jurisprudence, in which a uniform construction of a

law is binding to a great extent upon the courts who subsequently pass upon the same subject.

Part II. — In part second we have an exhaustive exposition of the conflict of laws from the ancient times up to the present day. After referring to the laws and customs of the ancients, Professor Streit gives us some details in regard to the condition of the Greek colonies in Egypt, where they had been given by the Egyptian Kings the privilege of being governed by their own laws.

The sketch of the Hellenic jurisprudence in regard to aliens and the privileges granted to them by special compacts is one of the most interesting chapters of this part. Here also the author deals with the much-mooted question of consuls in ancient Greece. We are informed that the then existing "consuls" had some resemblance to the modern consuls because they were chosen either amongst aliens to whom their native country intrusted the care of the interests of their citizens, or, as was the case more usually, they were citizens of the city in which the foreigners resided, which corresponds in some way to the modern "honorary consuls" when the nationals of a state act in such capacity for a foreign country.

The Roman epoch is also described in a very learned manner and the numerous quotations in the book show the thoroughness of the work. The author follows, step by step, the juridical situation of aliens in the Roman State, and concludes with a skilful sketch of the development of the *jus gentium,* which occupied such a prominent part in the legal science of Rome.

Professor Streit, after reviewing the conflict of laws in the Middle Ages and referring to the prevalence of the *personal law* during the Carlovingian epoch, and the *lex rei sitæ* during the feudal times, concludes with an exposition of the privileges enjoyed by various foreign communities in Constantinople during the Byzantine Empire, when such foreigners were permitted to have judges of their own for the adjustment of their differences. Therefore, the origin of the so-called "capitulations" in Turkey is even anterior to the grant made to King Francis by Sultan Suleiman in the sixteenth century.

This chapter ends with a review of the works of some eminent Italian jurists of the Middle Ages, who are considered, together with the Germans, the real founders of the law of conflicts.

Part III. — The author in the third and last part of this volume explains the various attempts made to embody in international compacts

a uniformity of legal principles connected with private international law and the results already obtained. He subsequently deals with the juridical condition of aliens in different countries, the famous doctrine of the *statua personalia, realia* and *mixta* occupying a prominent place in this exposition, and ends with a review of international criminal law and of the law of extradition.

After acknowledging the great services rendered to private international law by the Italian writers, and particularly by Mancini, he pays a glowing tribute to the great Savigny, the founder of the theory of the obligatory force of foreign laws in certain cases. Professor Streit concludes the subject by pointing out the tendency of the recent Anglo-American jurists to abandon the old theory of *comitas gentium* and to adopt the German view.

Such is a summary review of the volume of Professor Streit's book on private international law. It is to be hoped that the author will furnish us with a French or German text of his work, so that it may be understood by others than Hellenists or Greeks.

THEODORE P. ION.

American Diplomacy under Tyler and Polk. By Jesse S. Reeves, Ph. D., Assistant Professor of Political Science in Dartmouth College. Baltimore: The Johns Hopkins Press. 1907. pp. 335.

Between the years 1841 and 1848 four great issues in our national development pressed critically forward and found final adjustment — the Maine boundary, the annexation of Texas, the Oregon boundary, and the war with Mexico resulting in the acquisition of California. Each of these issues involved a question of national boundary. All except the first involved the bigger and more dramatic question of the westward expansion of the nation. Upon the assumption that these boundary questions demarcate an epoch reasonably distinct in the history of American foreign relations, Dr. Reeves has presented us with a little volume which in many ways is a real contribution to the diplomatic and political history of the United States.

The first two chapters, devoted to the diplomacy of the northeastern boundary dispute, furnish perhaps the least interesting and least satisfactory portion of the work, although this is doubtless due in large measure to the nature of the questions involved. The controversy had its origin in boundary designations set forth in the treaty of 1783, which

conformed in no wise to the geography of the regions described. Few, if any, principles were applied or developed. Settlements of the mooted boundary was delayed through many years by the uncompromising attitude of both nations, aggravated and embarrassed on the part of the United States by the stubbornness of Maine and Massachusetts. Dr. Reeves describes in some detail how the diplomacy which led up to the Webster-Ashburton treaty was hampered and embittered by the *Caroline* affair, the McLeod arrest, and the *Creole* affair; but upon these well-known incidents of our diplomatic history he throws little new light.

Beginning with the third chapter Dr. Reeves takes up the diplomacy of the three great expansive movements, toward the Rio Grande on the south and toward the Pacific on the north and south. There are certainly many who would dispute with Dr. Reeves the assertion that "in its essentials the expansion of the United States to the southwest is not radically different from its expansion over the Mississippi Valley, to the northwest into Oregon, and on across the Pacific to Hawaii and the Philippines." The expansion of a state toward natural geographic boundaries over contiguous territory almost wholly unsettled (or settled sparsely by emigrants from the expanding state) is so intrinsically different in purpose and result from the extension of sovereignty over a remote territory in the eastern seas, occupied by people of another race exhibiting various stages of civilization, that, far from being essentially alike, these two directions of expansion present no points of similarity at all save that both are instances of territorial acquisition. It will, however, perhaps be generally admitted that the national impulses which led to the expansion of the United States over Texas, Oregon, and California were fundamentally identical.

Chief interest in the work of Dr. Reeves possibly centers in his two theses: (1) That the annexation of Texas, instead of being, as Von Holst and others have depicted, the triumph of a deep-laid conspiracy on the part of the South for the extension of slavery, was in its inception a nonsectional movement, prompted by larger national motives, and that it was only in its later stages, when slavery had grown to be a national question coloring every political issue of importance, that Texas annexation and slavery extension became identified; and (2) that the annexation of Texas and the war with Mexico which followed "were separate episodes which had no necessary connection," the latter being in reality an offensive war waged for conquest and aggrandizement.

The first of these theses is admirably sustained, Dr. Reeves going so

far as to show that the union of the Texas issue with that of slavery extension in reality only retarded and in the end came near to wrecking the cause of annexation. The latter thesis he supports by endeavoring to show that Polk came to the presidency with a well-developed plan for wresting California from Mexico, by diplomacy and purchase if possible, by war and conquest if necessary. Unsatisfied claims of American citizens against Mexico, which had been grist for contention between the two Republics through many years, furnished the groundwork for the plan. It is perhaps true enough that Polk coveted California from the beginning, that he made an abortive attempt to secure the territory through diplomatic channels, and that he took steps to make certain that California should be the fruit of the war, if war resulted. But it must be remembered that Mexico had long ago declared that annexation must be considered "as equivalent to a declaration of war," that she steadily refused to renew the diplomatic relations which she had severed upon the annexation of Texas, and that since 1845 she had been amassing her troops at Matamoros, on the south bank of the Rio Grande. There is no evidence to show that Mexico intended to retreat as gracefully as possible from her threat of war. (The Mexican records have never been examined.) Moreover, there was the question of boundary dispute between Texas (now the United States) and Mexico — a question which Dr. Reeves seems to regard as negligible. Even in the light of Dr. Reeves's examination of the records, the situation seems to be summed up thus: Polk, greatly desiring California, prepared for war by the mobilization of troops and stood ready to strike upon slight provocation; Mexico, incensed by the annexation of Texas, assumed a similar, if not more bellicose, attitude and mobilized her troops upon the border. Mexico gave the provocation when General Ampudia crossed the Rio Grande and engaged General Taylor upon soil claimed by the United States. Upon the strength of this act of aggression American historians have justified the defensive character of the war. (Burgess, Middle Period, 331.) In the face of these facts it seems difficult to concede to Dr. Reeves that the Mexican war was not, to some extent at least, the result of Texas annexation. Nor does he fortify with any sufficient evidence his statement that "before the news of Taylor's fight reached him Polk had determined to declare war upon Mexico." It seems doubtful, to say the least, whether he is justified in concluding that the Mexican war must stand in the light of a premeditated aggression for conquest and spoliation completely separated from the incident of Texas annexation.

In at least one instance Dr. Reeves has slipped into a minor error that is somewhat glaring. He characterizes President Polk's appointment, without the consent of the Senate, of Nicholas P. Trist as special agent to negotiate with Mexico for peace as "a method quite without precedent or parallel." As a matter of fact, this power of appointing special agents without the consent of the Senate has been exercised from time to time by many Presidents from the very first year of our constitutional history. (Moore, Int. Law Digest, IV, 452–457.)

In spite of these criticisms Dr. Reeves has given us a preeminently scholarly treatment of a period of our history every detail of which has been tangled and knotted with, or completely obliterated by, the slavery controversy. It is perhaps to be regretted that, in the labyrinth of detailed diplomatic correspondence and negotiation which is set forth, the larger principles which shaped and impelled these great expansive movements of our history have been somewhat obscured, while interesting sidelights upon characters and events stand conspicuously forward. The examination of manuscript and printed records seems to have been carefully and exhaustively made, and the work, in consequence, can not fail to be stimulating, helpful, and suggestive to the student of American diplomatic and political history.

HOWARD LEE MCBAIN.

The Two Hague Conferences and their Contributions to International Law. By William I. Hull. Ginn & Co.: Boston. 1908.

The purpose of this volume is stated in the preface to be for service to the members of the National Educational Association, and other organizations named, in carrying out the recommendation of a report adopted by the association, that "the work of the Hague conferences and of the peace associations be studied carefully, and the results given proper consideration in the work of instruction." In accordance with this announced purpose the author, in presenting the labor and results of the conferences of 1899 and 1907, has marshaled his material in a unique and attractive way. Dividing his subject into thirteen general topics, such as "Origin," "Members," "Armaments," "Warfare on land," "Arbitration," etc., he treats each topic under two sub-heads, "The Conference of 1899" and "The Conference of 1907," summarizing the discussions and accomplishments of each conference as to the topic which he is considering. It is evident that this method of presentation fur-

nishes a ready means of comparing the results of the two conferences as to any subject in which a reader is peculiarly interested; and it further illustrates in a graphic manner the progress made by the nations toward the amelioration of the brutality of war and the elimination of its causes by demonstrating the decided advance made by the conference of 1907 over that of 1899, both in the spirit manifested and in the character of the discussions.

The first eight divisions (which are chapters in fact, though not so termed) deal with the origin and organization of the conferences (pages 1–51) except V, which is entitled "Organized public opinion," and the five divisions following (pages 52–448), with the subjects considered by the delegates. The remaining fifty-five pages (division XIV) are devoted to "A summary of results and their historical importance," and this the author divides into three parts, entitled "Attempts," "Achievements," and "Indirect results." In the first two parts he treats in a brief way of what was *attempted* by the conferences of 1899 and 1907, and of what was *achieved* by them. It is a resummarizing of the material already dealt with upon the basis of the conferences rather than the subjects. In the part entitled "Indirect results" are discussed "The federation of the world" and "The Third Peace Conference." The "historical importance" of the two conferences, which the author purports to discuss, seems, upon an examination of the text, to hardly warrant its inclusion in the title of this portion of the work.

The discussion of "Organized public opinion" (part V) in the volume may be fairly criticized, as introducing a subject pertaining to the individual members of the conferences rather than to them in their official capacity. The extent of the influences exerted by societies, associations, and organizations of various sorts being largely problematical, reference to them in a precise treatise, such as Professor Hull has published, weakens rather than strengthens his work. In a measure the same is true of the section entitled "The federation of the world." It deals with a phase of political development which, under certain conditions, might be directly related to an international conference such as those held at The Hague, but which is, so far as the two already held are concerned, irrelevant. That the peace conferences have to an appreciable degree supplied the lack of an efficient executive to enforce the recognized law of nations and the decrees of international tribunals, as asserted by the author, certainly requires more than a declaration to be generally accepted. The aroused conscience of civilized states and the

constantly increasing force of moral obligation can never form substitutes for an executive and the physical might upon which its authority rests. To accept such a doctrine takes us back to the idealism of Locke and Montesquieu.

As a whole, Professor Hull's book is of decided merit. The style is simple and direct. The digest of addresses is well done, and the quotations given have been well selected. The amount of space given to the various subjects is commensurate with their importance. These subjects are also well arranged for reference, and the volume will be unquestionably useful to students of world politics and to instructors in presenting to their pupils the progress which has been made by the nations toward the removal of the causes and horrors of war. The index might be improved. The analytical treatment, preciseness of statement, and practical style further commend the book to the general reader, as well as to the student of political subjects.

ROBERT LANSING.

Verfassung und Verwaltungsorganisation der Städte. 7. Bd. England-Frankreich-Nordamerika. Mit Beiträgen von F. W. Hirst, H. Berthélemy, Frank J. Goodnow, Delos F. Wilcox. Im Auftrag des Vereins für Socialpolitik herausgegeben. Leipzig: Duncker & Humblot. 1908. Pp. xvii, 227, 229.

This is the final volume of a survey of municipal organization undertaken by the *Verein für Socialpolitik.* The first three volumes were devoted to Prussia; the fourth, to several of the smaller German States; the fifth, to Switzerland; and the sixth to Austria. The seventh volume is devoted to brief accounts of the municipal organization in England, France, and the United States. The portion of this volume dealing with France is printed in French, and the parts devoted to England and the United States are printed in English. The proof-reading has been carelessly done, and, as might have been expected, the German printers have made numerous small errors in the English and French texts. There is, however, prefixed to the volume an elaborate table of corrections to the parts written by Prof. Goodnow and Dr. Wilcox.

The account of English municipal government consists of a brief discussion concerning the general municipal organization in England, and of separate discussions of the governments of the cities of London and Leeds. This portion of the book is done by the competent hand of

Mr. F. W. Hirst, and furnishes perhaps the best brief discussion of English municipal government at the present time.

The discussion of French municipal institutions has been entrusted to M. Henry Berthélemy, the well-known authority on administrative law. In the brief space of seventy-five pages M. Berthélemy gives an excellent account of the French municipal government. It is to be regretted that he did not include a discussion of the government of Paris; his treatment of this city is confined to a few brief passages in which he indicates the manner in which its organization differs from that of other French cities. M. Berthélemy's opinion regarding the political character of the *conseils municipaux* is of interest:

> La grande majorité des électeurs des villes est constituée par la population ouvrière. Dirigés par des comités de politiciens qui ont en vue bien moins les intérêts de la cité que la satisfaction d'ambitions personnelles, les ouvriers sont facilement dupes des intrigants ou des agitateurs sans scrupules. Les grandes villes françaises sont pour la plupart administrées par des assemblées composées en majorité de gens au dessous de la tâche qu'ils assument, et parfois même d'une moralité douteuse. (p. 170.)

In the part of the volume devoted to the United States Prof. Frank J. Goodnow contributes an excellent brief account of the position and powers of cities in the United States, and Dr. Delos F. Wilcox discusses briefly the municipal governments of Washington, New York, Chicago, Philadelphia, St. Louis, Boston, Baltimore, Cleveland, San Francisco, and New Orleans.

It is somewhat difficult to determine to what audience the volume under review is addressed. The series as a whole is evidently intended for German readers, but the accounts here printed are available only to those who read English and French, and in these languages there are more exhaustive and more satisfactory accounts of municipal organization than are here given. The general discussions of English, French, and American municipal institutions, by Hirst, Berthélemy, and Goodnow, while excellent, are too brief to be of much value to anyone not already possessing some knowledge of municipal administration. Dr. Wilcox's work on the government of great American cities is the only new matter in the volume, and while it shows defects incident to the task of brief summarization, seems well worth being issued in a form more available to American readers.

W. F. Dodd.

Texts of the Peace Conferences at The Hague. By James Brown Scott, editor. Boston: Ginn & Co. 1908.

Under this title is presented a work of 410 pages, containing the texts of both of the Hague conferences, together with tables showing the signatures, adhesions, and reservations made by the nations of the world to the various conventions and acts. The last 70 pages are taken up with an appendix containing such related conventions and documents as the various Geneva conventions, instructions to the armies of the United States, the Brussels project for laws of war, the declarations of Paris and St. Petersburg, the Oxford Manual, and the convention of 1904 regarding hospital ships. The book is furnished with a 30-page "index-digest" which should prove convenient in searching for the various references in conventional international law to any given doctrine.

The work is prefaced by a brief note from Mr. Elihu Root, Secretary of State, the keynote of which is that "The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward."

The preface is followed by an introduction by the editor dealing with the growth of the conference idea, and especially with the work of the two Hague conferences. This necessary historical background is briefly set forth to aid the student in his use of the texts.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

(For table of abbreviations used, see Chronicle of International Events, p. 195.)

Aerial navigation. La navigation aérienne en droit international. Analyzed and translated from the German by *J. Bonnecase.* J. de dr. int. privé et de la jurisprudence comparée, *35*:1054.

Anglo-German relations. The policy of the "clean slate" towards Germany. *Archibald Hurd.* Fortnightly R., N. S. *84*:913.

Arctic lands. La question de la souveraineté des terres arctiques: la question du passage du Nord-Est: conclusion. *R. Waultrin.* R. générale de dr. int. public, *15*:401.

Asylum. Le droit d'asile dans les légations et les consulats étrangers et les négociations pour sa suppression en Haïti. *R. Rolin.* R. générale de dr. int. public, *15*:461.

Austria. The power behind the Austrian throne. *Edith Sellers.* Fortnightly R., N. S. *84*:925.

Austria-Hungary. La condition internationale de l'Autriche-Hongrie et le nouveau Compromis douanier et commercial. *J. Blociszewski.* R. générale de dr. int. public, *15*:509.

Congrès de Berlin, Le. II. *Gabriel Hanotaux.* R. de Deux Mondes, *47*:481.

Berlin treaty, Austria and the. *Rowland Blennerhassett.* Fortnightly R., N. S. *84*:751.

Berlin, Bulgaria and the treaty of. *Svetozar Tonjoroff.* North American R., *188*:833.

See under Eastern question.

Bulgaria. La situation diplomatique de la Bulgarie avant la proclamation de son indépendance le 5 octobre 1908. *G. Scelle.* R. générale de dr. int. public, *15*:524.

See under Eastern question.

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LATIN AMERICA AND INTERNATIONAL LAW

The entry of Latin America into the community of nations is one of the most important facts in the history of civilization. It resulted not only in widening the field occupied by International Law but also in radically modifying its character. Although the Latin States of America inherited the civilization of the peoples of Europe, they developed along different lines. In number, and in the fact of their common origin they were like the members of one large family who had been suddenly and almost simultaneously called into independent life.

This combination of circumstances caused these nations, upon their appearance in the general society of states, to exclude from their constitutions the principles of European public law which did not harmonize with the special character of their organization; and to reject, in their foreign relations, those principles and practices that were incompatible with their independent position or that did not favor their special conditions of development.

In this new community of states, problems of International Law *sui generis* and problems distinctively American arose and thus made possible the uniform regulation of matters of special interest and even in some cases of matters of universal interest regarding which a general world consensus of opinion had not yet been formed. Furthermore, this new society of states proclaimed principles which could only with great difficulty be brought forth from their hiding-place in an isolated convention or the usage of some European state.

To show in what manner, and up to what point, the Latin nations of America contributed to the development of the Law of Nations is the task set before us in this article, a work which, in spite of its importance, has not yet been undertaken by any of the publicists of Europe or America.[1]

[1] Every day, however, greater interest is being displayed in this continent in the investigation of that subject, as is shown by two very significant facts. The first is the initiative taken by the "American Academy of Political and Social

We shall divide this study into three sections corresponding to the three periods into which the diplomatic history of Latin America naturally falls.

The first period, which begins with the independence and runs to the middle of the nineteenth century, is interesting to a high degree, because in it the conditions under which the Latin-American States came into the life of independent nations and the influences bearing on their developmen., are made manifest. The principal trait of this period is the growth of a twofold sentiment of solidarity. The United States felt its solidarity with Latin America in all that concerned the independence of the nations of the New World. The Latin States recognized the community of interests that existed between them, and, feeling that they were members of one great family of nations, desired to establish a political unity, a confederation, which would furnish them protection from the dangers of European intervention, show them the course to take in their new life, aid them in arriving at the best solution of their special problems, bind them together through mutual interests, and obviate the conflicts that might arise between them.

At the same time, the United States, while coming forward naturally, to make common cause with these nations to prevent their oppression by Europe, soon began to develop a policy of hegemony on the American continent.

In the second period, from the middle to the last third of the nineteenth century, the domestic and foreign relations of the Latin-American States underwent a great change. The idea of confederation weakened with the disappearance of the fear of re-conquest, but the sentiment of a new solidarity persisted, and the attention of these nations was directed to the formation of closer relations amongst themselves and with Europe. The policy of hegemony of the United States in its evolution also presented new phases, meeting the new necessities of the American continent.

Science" in publishing annually a volume devoted to a study of the contribution the Latin-American States have made to the advance of culture and the progress of civilization. The second is the meeting in Santiago, Chile, at the end of the year 1908, of the First Pan-American Scientific Congress in which all the States of the New World were represented and which devoted itself exclusively to the study and elucidation of problems of American interest.

In the third period, beginning with the last third of the nineteenth century, the foreign policy of the various countries followed a new course. This policy, which was characterized by a desire for peace, aimed to strengthen a triple bond of interests, which, far from being mutually exclusive, support and complete each other, viz: with Europe, with the United States, and amongst themselves.

This triple bond gave to the community of American states and to the world community of nations their present characteristics.

CHAPTER FIRST

I

In view of the fact that the peculiar characteristics of the Latin-American nations and their international relations were determined by the special conditions of their development, it is of prime importance to analyze those conditions into their constituent elements, to wit, their physical, ethnical and social environment on the one hand, and the influence which Europe as well as the United States exercised over them on the other.

With an area four times as great as that of Europe, with colossal undeveloped natural wealth, with a sparse population and defective means of communication where they were indeed not altogether lacking, with a tropical or semi-tropical climate, the people of Latin America were placed in a *physical environment* totally different from that in which the nations of Europe had developed.

Considered *ethnically,* this part of the world showed greater diversity than Europe. Europe is formed of men of single race, the white; while Latin America is composed of a native population to which in colonial times was added in varying proportions an admixture of the conquering race and emigrants from the mother country, negroes imported from Africa, and the creoles, that is, those born in America but of European parents. Out of this amalgamation of races (the aborigines, the whites, and the negroes, together with the creole element), the Latin-American continent presented an ethnical product which was no less peculiar than its physical environment. The resultant *colonial society,* the combination of

those ethnical elements upon a soil distinguished by so many peculiarities, is completely *sui generis;* in it the whites, born in the mother country, although in the minority, exercised the control and guided a multitude which was in great part illiterate and ignorant.

The creole element, the only thinking part of the population, felt the injustice with which the mother country treated its colonies. The "élite" of this class, instructed by travel and the perusal of the philosophical writings of the eighteenth century, took advantage of the embarrassing position in which Spain found herself because of the Napoleonic wars, and followed the example of the United States, dragging the entire creole element into a movement of emancipation.[2]

In the struggle for freedom, the Spanish-American colonies looked upon one another as brothers and gave military aid to one another in this common cause, in spite of the enormous distances which separated them.[3]

Upon gaining their independence, they were exposed to the influence of both the United States and Europe. From the example of the United States, the Spanish-American statesmen perceived that the emancipation must be essentially political, not social, the sole aim being to break the bond of subjection that bound the colonies to the mother country. It was the realization of this fact that made them see that it was only in the public law that they could and should build entirely anew, following in this the political insti-

[2] It is not worthy of study, whether the colonies of Spanish-America were prepared or not for independent life; whether or not the idea of independence was diffused through the entire mass of the population; whether they had any exact notion of what they proposed to bring about; in short, whether the movement of emancipation was due to a national sentiment duly matured or was merely a fulfillment of one of the laws of historical psychology, — that a people will take advantage of the difficult situation of another people in order to exercise against that other any rights to which it believes itself to be entitled, — or was, as we ourselves believe, due to a combination of the two.

[3] Brazil secured its independence in 1822, preserving the monarchical form of government, forming therefore and because of difference of origin, a nation that did not closely unite with the republics of Spanish America. Because of its form of government, its greater population, the extension and richness of its territory, Brazil was better known to the European countries and held by them in greater esteem than the other Latin-American countries.

tutions of the United States as being those most suited to nations recently freed from the yoke of the mother country.[4]

They organized their respective countries uniformly, subjecting them to a constitutional regimen whose principles and forms were republican, liberal and democratic. And this uniformity of views is so much the more worthy of note because in proceeding thus uniformly the statesmen of these new nations did so spontaneously and without any previous agreement of any kind whatsoever and in spite of the formidable reaction against those principles which at that time was being felt, above all in France.

This sudden political change, for which Latin America, because of its education, was not prepared, brought as an almost inevitable consequence civil wars, dictatorships and constant modifications of the fundamental ordinances of those countries in the first period of their independence.

Although the new states experienced all these changes in their public law, in other matters they were exposed to the direct influence of Europe, as they were of the same civilization and connected with the Old World by powerful bonds of culture and commerce. But none of the European nations exercised a greater influence over them than France, which, through the expansive force of its ideas and institutions, even came to serve as their model in private law.

Thus the former Spanish colonies of America were born simultaneously into political life, forming a family of states in which the pride of independence, the love of liberty and the spirit of fraternity, developed an implacable hatred towards all foreign domination, and an eager striving for the formation of a political entity which would protect them against all attacks on their sovereignty and maintain peace among themselves.

These aspirations and this hatred, manifestations of one and the same psychological law, and necessary products of the factors and the influences we have just noted, are the source out of which

[4] It is to be noted that these institutions of the United States were known in Latin-America principally through the intermedium of the French constitution of 1791 and the Spanish constitution of 1812, both of which derived their inspiration from the constitution of the United States of 1787 and from the writing of the French philosophers of the eighteenth century.

sprang the whole life and evolution of the Latin-American peoples in this fundamental period of their history, and explain the attitude naturally assumed by them in the international community of nations.

II

In the New World existed the Latin group and the Anglo-Saxon. These two, despite their very great dissimilarities, had certain common interests which served as bonds between them. They differed in religion, language, usages and customs; and although the Anglo-Saxon furnished to the Latin the model of its institutions, it was not fitted to provide those other elements of life and culture necessary for prosperity: literature, commerce, capital and population. This caused between the two a separation so marked that they came to know each other only through the intermedium of European literature. From the French literature the Latin Americans gained their knowledge of the United States, and they in turn were known in the United States through the literature of England. But in spite of this, the circumstances of the emancipation, the similarity of their political institutions, and their geographical situation, created between them a feeling of continental solidarity, but only in so far as concerned the independence of all the States of the New World from their respective mother countries.

The movement of emancipation of the Spanish-American States (April, 1810–December, 1824) and that of the United States, were proceedings without precedent in the international relations of Europe and greatly alarmed the governments of that continent.[5] These powers looked upon the action of the colonists as civil war, as an attack on the integrity of the mother country. The colonies of America, on the other hand, maintained that such an act was the legitimate exercise of a right, the logical consequence of indi-

[5] In the diplomatic history of Europe there is a case which is very analogous to that of the emancipation of the American colonies. Reference is made to the revolt, at the end of the Sixteenth Century, of the provinces of the Low Countries against Spain, from which they depended; and the reunion of the seven provinces of the North in a "Perpetual Confederation" which declared its independence from Spain in 1581 and adopted the republican form of government. Spain recognized the independence of these provinces almost a century afterwards, in the treaty of Münster of 1648.

vidual liberty, by virtue of which they could form themselves into sovereign states. They maintained, therefore, that it was not a question of a civil struggle but of international war.

Further, they would not admit the possibility of a future return to the condition of their former dependence on the mother country; nor would they agree to the extension to the new continent of that policy of the balance of power and of intervention which was at that time the foundation of the international politics of the Old World; nor would they tolerate the idea that the States of Europe might acquire any part of the American continent, however unexplored it might be, that is to say, regions "nullius" according to the then dominant doctrines of law.

The states of the New Continent, therefore, insisted upon their independence, liberty and equality; and maintained that America, in view of the circumstances attending its birth into political life, should not be absorbed by Europe but should be left free to follow the path of evolution most in keeping with its destinies.

These ideas, which were held by statesmen of the United States from the end of the eighteenth century, and by some Latin-American thinkers from the beginning of the nineteenth century, found exact expression in the message of President Monroe in 1823. While this message did not have the object of making any immediate declaration of principles, still it expressed so clearly the situation of the New World with respect to the Old, and contained such an accurate synthetic statement of the aspirations and destinies of America as to become its political gospel. And the tacit acceptance by Europe of the declarations of this document, together with the decided determination of the Latin-American states to maintain them, made possible the final entry of an "American Continent" into the community of nations.

Upon entering thus into that community, the states of America fixed for all time the cardinal points of their foreign policy in those same principles, in opposition to the principles then dominating in Europe. In this manner, they not only contributed with new principles to the development of International Law, but also laid the basis of that which may be called "American" International Law.

III

In regard to the reciprocal relations of the Spanish-American nations, their statesmen, and especially those of Chile in 1810,[6] believed in the necessity of a confederation of the peoples of Spanish origin, which, while respecting the autonomy of each state, would not only protect them against the attacks of European countries, but also fix the course of domestic and foreign politics, harmonize their interests and obviate or settle all conflicts between them.

Thus at the beginning of their independence, they inaugurated a policy of fraternity which presented a remarkable contrast to that of rivalry and passion then characteristic of the international life of Europe.

This idea of confederation, which in the breadth of views shown has few precedents in the modern history of human thought and none in European diplomacy, dominated with more or less intensity this entire first period. And the statesmen of the day believed that the best method of putting it into practice was through the convening of congresses in which all the Spanish-American states should be represented.

It is indispensable to give an outline of the various congresses held during this period and of the pacts subscribed in them even

[6] In the project of the "Declaration of the Rights of the People of Chile" of 1810, (modified in 1811), the following principles are proclaimed which do honor to the clear-signtedness with which the statesmen of Chile discerned the future destinies of America: *First*, The peoples of Latin-America can not, isolated, defend their sovereignty; in order to develop, they must become united, not for reasons of domestic policy, but for security abroad, against the projects of Europe and to avoid wars among themselves. *Second*, This does not at all mean that the States of Europe should be regarded as enemies; on the contrary, it is indispensable to form, as far as possible, closer relations of friendship with them. *Third*, The nations of America should meet in a Congress for the purpose of organizing and strengthening themselves (On this last point, the Declaration states that "the day when America united in a Congress, whether of the Nation or of its two continents or of the South, speaks to the rest of the Earth, its word will be respected and its resolutions contradicted with difficulty").

This was not the only time when ideas of this character were expressed by statesmen of Chile. In the proclamation addressed to the Chilian people by the Supreme Director O'Higgins, dated the 6th of May, 1818, mention is made of "the great confederacy of the American Continent, capable of maintaining its political and civil liberty."

though they were not ratified. Such an outline will clearly show the international necessities and aspirations of these countries and the measures they judged to be most fitted to satisfy them; the character of the people and their international tendencies; up to what point they desired and could initiate a policy of an international character which was at times distinctively American.

Furthermore, the conventions therein subscribed exercised a considerable moral and political influence, as they kept alive the idea of Latin-American solidarity, forming and directing public opinion, while at the same time they furnished the model in many points for the agreements celebrated by these states with each other and with European countries.

Since 1822, Bolivar, the great liberator, at that time President of Columbia, had labored to bring about a confederation of the Spanish-American countries, planning for that purpose, a Congress which would meet in Panama. By way of preparation, he negotiated treaties of "Union, Alliance and Confederation" with several countries. Those treaties and the projected congress, it is worthy of comment, bore a character which was entirely different from acts apparently analogous celebrated at the time in Europe, such as the Treaty of the Quadruple Alliance of Chaumont in 1814, the Treaty of Paris of the 30th of May of the same year, the Congress of Vienna of 1815 and other congresses of that epoch.

The congress planned by Bolivar met in Panama in 1826. Representatives from only Mexico, Central America, Columbia and Peru were present, and ten sessions were held, between the 22nd of June and the 15th of July of the same year; and in them, the matter of the mediation of Great Britain for the purpose of obtaining peace between Latin-America and Spain was discussed, without, however, any agreement being reached thereon.

In that congress, a pact of "Union, Alliance and Perpetual Confederation" was subscribed, two others on Contingents of Army and Navy, and another on the transfer of the American Assembly to Mexico (Tacubaya).

The object of the first pact was to maintain defensively and offensively, if necessary, the sovereignty, independence and territorial integrity of all and each of the Confederated Republics of America,

against all foreign domination (articles 2, 3, and 21) while, as a consequence, prohibiting any one of them from making peace with the enemies of their independence without specifically including all the allies (article 10). The manner in which the confederates should in case of necessity give their aid on land or sea was minutely regulated (articles 4 to 10). In order to avoid difficulties among themselves, especially in the matter of the delimitation of boundaries, it was agreed that as soon as the respective boundaries had been marked and fixed in accordance with special conventions to be celebrated by the interested states, these boundaries should be guaranteed by and placed under the protection of the Confederation (article 22).

In order to make the confederation efficient and stable, the parties agreed to constitute every two years a "General Assembly" to which each party would send two ministers plenipotentiary. One of the objects of this Assembly was, among others, to

> contribute toward the maintenance of unalterable peace and friendship between the confederated powers, serving them as adviser in great conflicts, as a point of contact in time of common peril, as a faithful interpreter of the treaties and public conventions celebrated therein, whenever any doubt may occur as to their meaning, and as peacemaker in their disputes and differences;

as well as to

> labor for conciliation and mediation between the allied powers or between one or more of these and one or more of the powers foreign to the Confederation (article 13).

The contracting parties bind themselves and solemnly promise to compromise amicably between themselves all differences which to-day exist or may exist between any of them; and, in case the disagreements between the powers are not terminated, then, prior to any act of violence, they will be referred to the judgement of the Assembly, and the decision rendered shall not bind the powers if said powers shall not have agreed beforehand that it should so bind them (article 16).

None of the parties may declare war against another without publishing previously a detailed account of the matters leading up to the conciliatory decision of the General Assembly, under penalty of being excluded from the Confederacy (articles 16 and 19).

None of the confederates may declare war against a country foreign to the Confederation without having previously requested the good offices of the Confederation (article 18).

In addition to the bonds created between the allies, certain norms were established according to which they should conduct their foreign policy, and which had an exceedingly unusual character, especially in that epoch. These were: considerable restrictions on the freedom of the confederates to change their form of government, as well as to celebrate alliances with powers foreign to the Confederation (articles 14, 18, and 29); the citizens of any of them, might, without any other requirement than a manifestation of the will, obtain naturalization in the territory of the other confederates, and, even without becoming naturalized might have the same rights as nationals (articles 23 and 24); the slave trade was prohibited (article 27); finally, in a supplementary article, the idea of the codification of International Law was expressed. In this article it is declared that the confederates, desiring to live in peace with all the nations of the universe agree that as soon as the treaty of Confederation is ratified,

> they will proceed to fix in common accord all those points, rules and principles which must serve as a guide to their conduct in both cases [peace and war], for which purpose they will again invite neutral and friendly powers to take an active part in such negotiations, if they deem it convenient, and to participate, through their Plenipotentiaries, in the drafting, concluding and signing of the treaty or treaties which may be entered into with such an important object in view.[7]

The treaty was to remain in force during the war of independence, and once peace had been declared, it was to be revised in the Assembly of Plenipotentiaries (article 30); and any of the states of America which had not signed it might adhere to it (article 26).

The resolutions of the Congress of Panama were not ratified; only Columbia ratified the Pact of Union.

This congress undoubtedly did not pass unobserved either by the United States (which, invited to participate, sent representatives who did not arrive in time to take part in the Assembly), nor by

[7] This article was due to the initiative of the Peruvian Plenipotentiary, who, in article 16 of his draft of a treaty of confederation, presented to the Congress of Panama, provided that "two individuals will take it upon themselves to present in the coming year a draft of an American Code of Nations which will not be contrary to European customs."

Europe, where in some countries, especially in France, it gave rise to considerable anxiety.[8]

Several years afterwards, and on several occasions (in 1831, 1838 and 1840), Mexico took the initiative in calling together a new Spanish-American congress. Many of the countries receiving the invitation, accepted with enthusiasm, but the congress never met. The object of the projected congress was similar to that of the Congress of Panama, but more practicable. An attempt was to be made in it to effect a union of all the republics of Latin America for the purpose of defending themselves against foreign agression; to secure the mediation of neutrals in case of differences between any of the sister republics; and finally, to draft a Code of Public International Law.

In 1846 and 1847, the Latin-American states believed their existence to be threatened by the expedition which the Ecuadorian General Flores was preparing in Spain with the expressed purpose of recovering the government of Ecuador of which he had been deprived. The Spanish-American states had well grounded motives for the belief that the real object of the expedition was to create in America a monarchy over which a Spanish prince would be placed. According to some, the states that would comprise the monarchy would be New Granada, Ecuador, Venezuela, Peru and Bolivia; according to others, it would be composed of only Ecuador, Peru and Bolivia. Public opinion in the Spanish-American countries was aroused and the governments echoing the general indignation, discussed the affair and made arrangements to resist the expedition at whatever point it might arrive. At the same time it was believed that the most opportune measure was the convening of an American Assembly to consider the matter.[9]

The congress met in Lima, and was participated in by the states which believed themselves most directly threatened by Spain: New Granada, Ecuador, Peru, Bolivia and Chile. The congresses held twenty sessions between the 11th of December of 1847 and the

[8] As to the importance given to it by the United States, *vide*, Moore: "A Digest of International Law," (Washington, 1906), Vol. VII, page 940.

[9] The expedition planned went to pieces early in 1847.

1st of March of 1848. On the 8th of February, 1848, two treaties were signed: one of "Confederation" and the other of "Commerce," and also two conventions, one consular and the other postal.

The treaty of "Confederation" in its preamble states that the Spanish-American republics, which are

> bound together by origin, language, religion and customs, by geographical position, by the common cause they have defended, and by the analogy of their institutions, and, above all, by common necessity and reciprocal interests, cannot be considered but as parts of the same nation, which should unite their forces and resources to remove all the obstacles opposing the destiny offered them by nature and civilization.

The object of the pact was not only to unite the signatory powers for the purpose of repelling any attack on their independence or territorial integrity, but also to ward off any attempt to alter their political institutions or to do injury to the states. Articles 1 and 2, referring to this matter, have closely followed, and completed, the declarations contained in the Monroe Doctrine on the same point. The pact further proposed to prevent conflicts between the confederates, especially those arising out of boundary disputes, establishing for this purpose that, in default of special stipulations between the interested parties, the boundaries should be those possessed by the respective countries in the epoch of the conquest of independence from Spain, and further providing rules for their demarcation (article 7). It was likewise established, with the same object, that none of the confederates should interfere in the internal affairs of another, nor should permit preparations to be made in its territory to disturb the internal peace of any of the others (articles 12 and 13). In order to maintain the bond between all these countries, it was agreed that there should be a "Congress of the Confederation," made up of a plenipotentiary from each state, which should meet periodically.

Without materially restricting the sovereignty of the individual states, this assembly had, however, important powers, especially for restoring harmony and preventing or resolving the conflicts of the allies either among themselves or with foreign countries (articles 3 and 4, and 18 to 23). When questions arose between the allies, they were to be decided pacifically, and, in case of necessity, the

government of each one of the republics should offer its mediation, and labor to have the matter submitted to arbitration. And if that mediation be fruitless and arbitration be rejected, "then the Congress of the plenipotentiaries, after examining the grounds upon which each of the Republics bases its contention, will give the decision it deems most just;" and if one of the allies should refuse to conform to the findings in the matter or refuse to carry out the decision of the congress, the other allied republics were to consider themselves relieved of all their obligations toward that ally, without prejudice of the other measures which they might see fit to adopt in order to carry out the decision (articles 9 to 12). This pact further carefully regulated the juristic situation created between the belligerent state and the confederates in the case of a war breaking out with a foreign country, as well as the manner in which each one should furnish its military contingent in such a case (articles 5 and 6, and 15 to 18). It also contained very important provisions as to the foreign policy of these countries, which was declared in article 8 in the following terms:

> If an attempt should be made to unite two or more of the confederated Republics in a single State, or divide into several States any of said Republics, or to separate one or more ports, cities or provinces, from any of them to unite with another or with a foreign power, it will be necessary, in order to make such a change effective, that the Governments of the other confederated Republics shall expressly declare, either directly or by their plenipotentiaries in the Congress, that such a change is not prejudicial to the interests and security of the Confederation.

Extradition for political offenses was not approved (article 14).

This treaty of confederation had no fixed term of years in which to run, and it was to be submitted to all the governments of America without exception and their adherence to it solicited.

It is worthy of note, that this pact which established international norms of such great importance, did not make any provision as to the codification of international law, as was done in the Congress of Panama, in spite of the fact that the instructions of the Peruvian Government to its delegates to the Congress of Lima emphasized the advisability of such a codification as the best method of arriving at a knowledge of the reciprocal rights and duties of the states.

In the Treaty of Commerce signed in that same Congress, it was determined that the citizens of any of the confederate countries should have, in the territory of the others, the same rights as the citizens of the latter, that is, perfect freedom of person and property. Provision was also made for the free navigation of the international rivers of America, but only for the riparian republics or those whose territory was traversed by the river (article 8). Certain principles of maritime law were also proclaimed: the abolition of privateering among the confederates; that the neutral flag covers enemy's goods excepting contraband of war; that blockades are not binding except when effective; that the sacking of the cities and places of the enemy is prohibited even when taken by assault; and that the slave trade is forever abolished, those participating in it to be treated as pirates.

The "Consular Convention" fixed in detail the duties of the consuls, their obligations and prerogatives, without giving them a diplomatic character or diplomatic immunities, but only certain privileges intended to protect them in the free exercise of their functions.

With the exception of the Consular Convention, which was accepted by New Granada, the conventions signed in this congress as well as those originating in Panama, were not ratified by the respective governments.

The war of the United States with Mexico in 1848 and the filibustering expeditions organized in the United States by Walker against Central America, awakened a feeling of distrust in some of the states of Latin America. These circumstances, coupled with the desire to enter into closer relations of friendship, gave rise to a pact known as "A Treaty of Union of the American States," which was signed by the representatives of Chile, Peru, and Ecuador on the 15th of September, 1858, in Santiago. This example was imitated on November 9th of the same year by Mexico, Guatemala, Salvador, Costa Rica, New Granada, Venezuela, and Peru, who, in Washington, entered into a treaty of alliance and confederation which was very similar to the one subscribed in Santiago.

While several of the principles enunciated in former conventions, such as ample civil equality and complete commercial liberty for the citizens of the interested parties (articles 1 and 4), extradition except for political offenses (article 6), and principles of law of maritime warfare, were proclaimed in this treaty of the 15th of September, others were brought forward in the interest of the formation of closer friendly relations between the contracting countries. Among these last were the agreements to recognize professional titles under certain conditions (article 8), to recognize judicially the documents, judgments, and testimony given and accepted in the courts of the territory of any of the other states (article 5), and an expression as to the general utility of adopting a uniform system of money, weights and measures as well as of harmonizing as far as possible the customs laws and duties through the celebration at the proper moment of conventions for the purpose (article 9). It was further recommended that energetic measures be taken to prevent the organization in any of the allied countries of expeditions directed against the legal order of any other of those countries. Revolutionists coming armed from abroad were to be treated as pirates (articles 14 to 18). In article 13 it was stipulated that

> each one of the contracting parties binds itself not to cede nor to alienate to another State, under any form, any part of its territory, nor to permit any nationality foreign to that dominating to establish itself within its boundaries, and promises not to recognize in this character any that may be established under any conditions. This provision will not stand in the way of any cession that may be made by the interested States for the purpose of regulating their geographical boundaries or in fixing their natural limits or in determining with mutual advantage their frontiers.

As a method of obviating wars between the parties, the same mode of procedure was agreed upon as that contained in the treaties of peace and friendship celebrated between these countries and the United States (article 19). In order to consolidate and strengthen the union between them and for the better realization of the object of the treaty, it was provided that a congress of the states should meet at least every three years, composed of one plenipotentiary from each country; this congress to act as mediator in case of disagreements arising between any of the contracting parties, and no one of the

states to be permitted to reject the offer of mediation (articles 20 and 21). This treaty was to run for ten years, a period which might be extended; and it was stated that any of the states of Latin America might adhere to it (articles 23 to 26).

The treaty of continental union subscribed in Santiago was accepted by Guatemala, Salvador, Costa Rica, and Mexico. The Argentine Republic, in an official note of the 10th of November, 1862, refused to support this treaty, on the grounds that it believed the document to contain priciples that were either already comprehended in the Law of Nations universally accepted, or in opposition of International Law. The government of Argentina particularly objected to the provisions of article 13, which, it held, imposed a limitation upon the sovereignty of the nation.

Again, in 1865, the old idea of confederation came to the fore in the arena of South American politics. The direct cause of this was the feeling of uneasiness growing out of the fact of the re-incorporation of Santo Domingo into the Spanish monarchy in 1861, the French intervention in Mexico in 1862 with the effort to found a throne upon the ruins of the republic, the plans of reconquest ascribed to Spain through its attempt in 1864 to occupy the Chinchas Islands belonging to Peru, and the imperialistic tendencies of the foreign policy of the United States, which the new Republics looked upon as a menace to their independence. It was in 1864 that Peru extended an invitation to the Spanish-American States of America to meet in a congress. Its purpose was not to frame anti-European resolutions: it was dominated by the desire of all the states to become more intimately acquainted with each other with the special idea of making better known their resources and means of defense. It aimed further at the adoption of principles that might put an end to boundary disputes and forever abolish war, substituting therefor arbitration as the only method of settling difficulties between them.

Enthusiastic response was given to the call by the Latin-American states, and Chile proposed that the United States and the Brazilian Empire be also invited.

The congress met in Lima on the 15th of November, 1864, and was attended by delegates from Chile, Salvador, Venezuela, Colombia,

Ecuador, Peru, and Bolivia. A delegate from Argentine Republic was also present, but his credentials did not empower him to subscribe the agreements that might be entered into at the congress.

During the sessions of this body, the conflict of Peru with Spain on the subject of the possession of the Chinchas Islands broke out, and the attention of the delegates became absorbed in the effort to arrive at the best method of deciding this question honorably and pacifically. The Peruvian government more than once during this period turned to this assembly in search of its opinion and advice in the matter of the relations with Spain.

In spite of the variety of subjects embraced in the programme of invitation, the Congress voted, for the above reason, only two pacts, both of the 23d of January, 1865: one of these was entitled "Union and Defensive Alliance," and the other "Preservation of Peace."

In the first of these conventions, the parties form an alliance to defend together their independence, sovereignty, and territorial integrity against all agressions, whether of foreign powers, of those signing the pact, or on the part of foreign forces that are directed by no recognized government (article 1). This alliance would become operative not only upon an attempt being made to deprive a nation of a part of its territory or to change its form of government or its internal constitution, but, also, should an effort be made to "bring any of the High Contracting Parties under a Protectorate or force it to sell or cede territory or to establish upon it any privilege, right or preference which may lessen or impair the free and complete exercise of its sovereignty and independence" (article 2). The parties promise likewise not to grant or recognize any protectorate or superior rights which affect their sovereignty and independence, and "not to alienate to another nation or government any part of their territory. This stipulation, however, does not prevent those parties possessing contiguous territory from making cessions which may be intended to fix better their limits or frontiers" (article 9). Finally, it is agreed to hold an international conference every three years (article 10).

In the treaty on "Preservation of Peace," the parties bind themselves to use pacific measures exclusively to put an end to all their

differences, including those arising out of the question of boundaries, submitting them to the final decision of an arbiter when they can not be settled in another fashion (articles 1, 2, and 3). If any of the parties should decline to submit the matter to arbitration, the allies are to proffer their good offices in order to influence the hesitating power to fulfill its obligations (article 4). Finally, provisions similar to those contained in the pacts of confederation, are drawn up in order to prevent the gathering of elements of war or the recruiting of men in the territory of one power for the purpose of hostile operations against any of the other signatory powers, and to stop those who may have fled from one country in search of an asylum in another from conspiring against the government of the state they left (articles 6 and 7).

In the study of these pacts, one pauses before the already cited articles 2 and 9 of the Treaty of Alliance, which make such a strenuous effort to secure forever the independence, liberty, and territorial integrity of all of the signatory powers as to deny them the right to relinquish voluntarily any of those attributes of sovereignty. We have noticed an analogous disposition in Article 13 of the Treaty of Union subscribed in Santiago in 1856.[10]

These conventions signed in Lima were not generally ratified by the signatory governments.[11]

IV

After the separate analysis of the congresses and pacts of confederation of the Latin-American states since 1826, it is important to proceed to an examination of them as a whole in order to learn what are their characteristic features and the results to which they have attained.

[10] The above cited articles 2 and 9 were undoubtedly children of the dread that Argentine, Uruguay, and Brazil, at the time at war with Paraguay, should dismember this country.

[11] On the 16th of May, 1867, the delegates of Chile, Ecuador, and Bolivia, in Lima, entered into a treaty upon principles of International Law, and, on the 3rd of October of the same year, the representatives of Chile, Peru, and Bolivia drew up a treaty almost identical to the above. These pacts, which were not ratified, contain provisions analogous to the conventions of "Union and Confederation" of 1848, 1856, and 1865.

The idea of confederation pursued by all of them was dominant not only in the minds of the statesmen but also in the public opinion of the period. It varied in intensity according to place and time. In fact, this tendency was stronger in the south than in the north of the continent; and in the southern portion, the confederation idea found readier support in the republics of the Pacific coast than in those of the Atlantic. The latter, because of their proximity to Europe and their location on the great fluvial route of the River Plate, had certain special interests which were even antagonistic to those of their sister republics and which did not permit the above idea to find favor with them. Moreover, this aspiration was most intensely manifested in times of danger and for that reason had always a passionate and lyric character. This circumstance, united to the philosophical education of the Latin mind and the facility which their independence gave them to lay down new rules in this matter as in Constitutional Law, brought about that the resolutions of these congresses on the subject of confederation were conceived in a strain altogether too idealistic and Utopian. This, or a similar reason, was urged by some of the governments for not ratifying the pacts we have mentioned.

But, on the other hand, even though ratified, these agreements could not have accomplished their purpose, because of several difficulties which stood in the way of a confederation. How, indeed, were these states to overcome the obstacle of the enormous distances which separated them, the absolute lack of intercommunication, the highly developed spirit of national independence, the bad blood engendered by the boundary disputes, the conflicts over the navigation of rivers, the baneful influences of civil wars due to the personal ambitions of revolutionary leaders, the lack of preparation of the peoples for political life and the want of common traditions?

However, if these pacts and congresses did not lead to the long dreamed of confederation, they nevertheless were not barren of important results. They exercised an important moral influence, as they not only kept alive the feeling of solidarity between the states of the New World, but also served as models for many conventions later adopted, and furnished an ideal to guide the diplomacy of the

future. The resolutions of these congresses, for this reason have contributed in no small degree to the development of International Law, as we shall see in the final pages of this article.

V

If the congresses and pacts reveal the ideals, aspirations, and necessities of Latin America, the factors we have just noted show at the same time the obstacles which the various countries met in the effort to follow in the path of their desires. By describing the four principal difficulties (the supersensitive spirit of national independence, the civil wars, the boundary disputes, and the questions as to the navigation of rivers), we will see another aspect of the international relations of the Latin-American countries among themselves. The problems of special character to which these conditions gave rise, have contributed in a manner different from that already noted to the development of International Law.

The supersensitive spirit of national independence caused the old administrative divisions of the colonies to split up into several new states instead of bringing several states together under one government. At the time of the struggle for emancipation, there were four vice-royalties in Spanish-America (Mexico, New Granada, Peru, and Buenos Aires) and seven "Capitanias Generales" (Yucatan, Cuba, Puerto Rico, Santo Domingo, Guatemala, Venezuela, and Chile). Bolivar formed of New Granada, Venezuela and Northern Peru, the United States of Columbia, which fell away in 1830 into three States: New Granada, Venezuela, and Ecuador. The old vice-royalty of Buenos Aires became subdivided into four States: Bolivia (which was separated from the vice-royalty by Bolivar in 1825), Uruguay, Paraguay, and the United Provinces of the River Plate. The United States of Central America, founded in 1823, split up into five separate States in 1839. All the attempts of federation or confederation made after this date, had no appreciable result.[12]

[12] In some of the conventions celebrated by Latin-American countries, the case is provided for in which new states should be formed in America by the dismemberment of those then existing: (*e. g.*, Additional and Explanatory Convention of 1833 to the Treaty of Peace, Friendship, Commerce, and Navigation between Chile and the United States of America of May 16, 1832).

The civil wars and the system of revolutionary leadership ("caudillaje"), the logical and almost inevitable consequence of the wars of independence, have opposed enormous barriers to the progress of these countries to the height of prosperity to which they were called through their situation in a continent of undeveloped wealth. Although waged over problems of domestic politics, these wars had an international significance. They not only lead, in fact, to the intervention of several states in the internal policy of the others (intervention which was invited sometimes by the government itself of the country affected), but also caused the development of International Law problems which were new or little known: *e. g.*, the question of the recognition of the belligerency of rebels, the rights and duties of neutrality, the responsibility of the state in the event of civil war, the international position of *de facto* governments, and many others.

Failing the confederation of the Latin states, the problem of the marking of the boundaries which the pacts of confederation strove to solve, of necessity came day by day more prominently to the fore. The constitutions of some of the countries fixed their lines on the basis of the *uti possidetis* of 1810, which was, moreover, recognized in fact by all the states, and proclaimed in the Congress at Lima in 1848.[13] Frequent conventions were concluded on the subject of boundaries. But, whether or not the boundary lines thus established were drawn on the authority of the *uti possidetis* of 1810, they were vague and sometimes conflicting, owing to the lack of precise geographical knowledge of the regions affected. For this reason, all the states of America have had boundary disputes with all of their neighbors. The peculiar geographical situation of these countries, located on the coast and with territory extending in toward the centre of the continent and delimiting several states at the same time, made such a clash inevitable. Brazil, for example, touches the frontiers of all the states of South America and the three Guianas.

[13] The term *uti possidetis of 1810*, is generally understood to mean the territory which the respective countries had the right to possess according to the Spanish administrative divisions obtaining at that date, the date of the beginning of the movement for emancipation.

with the exception of Chile.[14] Furthermore, the disputes extended over immense zones of territory [15] which were oftentimes claimed by two or more states at one and the same time.[16] It may be said that a very considerable part of the diplomatic history of Latin America reduces itself to an account of the struggle over boundaries. For this reason, and because of their great political and economic signifi-

[14] *Vid.*, as to all the Brazilian boundary disputes, G. Taumaturgo de Azevedo: "Límites Do Brazil" in the "Livro do Centenario," (Rio Janeiro, 1902), Vol. III, pages 69–136.

[15] Chile and Bolivia contested the sovereignty over two geographical degrees, the 24° and 25° of south latitude. This conflict, after being the subject of the treaties of August 10, 1866, and August 6, 1874, completed by the treaty of June 21, 1875, was the remote cause of the War of the Pacific about which we will speak later on. The dispute over the territory of the Missions, between Brazil and Argentine, involved 30,670 sq. kilometres. The dispute as to the boundary line between Chile and Argentine, affected 94,000 sq. kilometres. Peru lays claim to about two-thirds of the territory which Equador maintains belongs without question to it, covering about 240,000 sq. kilometres. By a convention of August 1, 1887, the affair has been submitted to the arbitration of the King of Spain. (*See*, on the origin of this conflict, Prado and Barreda: "Alegato del Perú en el Arbitraje sobre sus límites con el Ecuador," Madrid, 1905, pages 29–64.)

[16] Bolivia and Argentine disputed with each other the possession of the Puna de Atacama, while the same contest was going on between Chile and Bolivia, without any controversy, however, between Chile and Argentine. After Bolivia had renounced its rights over the zone by treaty of May 10, 1889, with Argentine, the conflict went on betwen Chile and Argentine. The question was finally submitted to a commision, subsequently to an arbitral tribunal and finally to a "sur-arbitro," the minister of the United States in the Argentine Republic. The award gave to Argentine about the whole of the territory in dispute.

Bolivia and Brazil laid claim at the same time to a considerable strip of the Acre territory, a portion of which was then, too, claimed by Peru. In order to put an end to the case, Peru and Bolivia submitted the question to the arbitration of the Argentine government by the treaty of December 30, 1902. Shortly afterwards, by the Treaty of Petropolis of November 17, 1903, Bolivia renounced all its rights over the territory in litigation in favor of Brazil, ceding thus to this state a country to which Peru laid claim. Because of this, a question has arisen as to what influence this cession may have upon the arbitral decision of the Argentine government which has not yet been given. (*See*, on this matter, Renault, Lapradelle and Politis: "de l'Influence sur la prócédure arbitrale de la cession des droits litigieux" in the "Revue Générale de Droit International Public, Vol. XIII, 1906, pages 309–324.)

And finally, the region called Putumayo is claimed by Peru, Columbia, and Equador.

cance, these contests occupy a place of capital importance in that history. They have given rise to armed invasions or to occupations of the tracts in litigation, by one of the interested parties and have, on more than one occasion, led to war. They have, as well, created interesting new problems of International Law: *e. g.*, rights and duties of the interested states in the territory in dispute, during the process of the contest; the value of *bona fide* acts of occupation in it;[17] the responsibility of the states for acts of civilized persons or native tribes committed in the contested zones.[18] These contests have been terminated generally by compromise or arbitration. In these cases, the arbitral sentence has always given more importance to titles of occupation, possession, prescription, etc., established by the interested states, than to the economic condition in which these territories would remain in consequence of the award. Thus, it has more than once occurred that these contests have been resuscitated, or remain only latent so that some day they may again become a new cause of conflicts.

By the special situation of the countries of America, the navigation of rivers has also been a problem of great importance which has given rise to serious conflicts where various States situated along the same river have had opposing interests.[19]

[17] Sometimes to avoid the difficulties of this situation agreements called those of neutralization have been celebrated by which the states promise to forbear from exercising acts of possession, or not to disturb the *modus vivendi* in that territory (*e. g.*, agreement of 1842 between Brazil and England in the dispute as to the boundary line of Guiana; of 1850 between England and Venezuela for the same reason; in 1889 between Chile and Argentine).

[18] *See* on these contests, Alvarez: "Des Occupations de Territoires contestés" in the "Revue Générale de Droit International Public," Vol. X, pages 651 *et seq.*

[19] To put an end to these conflicts, numerous conventions have been concluded, which may be placed in three categories, while laws have been passed declaring the navigation of those rivers to be free. (*See*, on the matter Alvarez: "L'Histoire Diplomatique des Républiques Américaines" in the review just cited, Vol. IX, 1902, page 564, note 1.) Some of these conventions are of special importance. In 1853, the Argentine Confederation celebrated with Great Britain, the United States and France, treaties over the free navigation of the rivers of Parana and Uruguay. In these treaties the contracting parties agree to use their influence to prevent the possession of the Island Martin Garcia by any state of the River Plate or its confluents, that had not given adhesion to the principle of free navigation.

Together with the civil wars and boundary questions out of which have sprung such peculiar problems, there should be taken under consideration the wars between the Latin states, some of which have had a juristic importance and legal effects which cannot be lightly passed over in the history of International Law.[20]

In order to complete the picture of the international relations between the Latin-American countries, we will say that the failure of

[20] In 1825, there broke out a war between the Empire of Brazil and the United Provinces of the River Plate, over the possession of the province of Montevideo. This had formed part of these provinces up to 1822, when Brazil annexed it under the name of "Provincia Cisplatina." When this province declared its independence in 1825, Brazil and the United Provinces entered upon a war with each other, as both had desired to incorporate it into their respective territory. The war was terminated by the treaty of the 27th of August, 1828, concluded through the mediation of the British government and completed by the convention of January 2, 1859, between Brazil, Argentina, and Uruguay. In this, the neutrality of Uruguay was proclaimed, Brazil and Argentine binding themselves to defend its independence and integrity. The sovereignty of Uruguay was limited in this pact in various ways, in its exercise in foreign affairs: it might not unite itself, confederate itself or sign treaties of alliance, or place itself under the protectorate of any nation, or part with any portion of its territory under any pretext. By the Treaty of Peace and Friendship of 1856 between Brazil and Argentina, the declarations of the convention of August, 1828, relative to the maintenance by those two countries of the independence of Uruguay, are confirmed. The neutrality of the Island Martin Garcia in case of war, is also stipulated, and the two countries agree to prevent this island from going out of the possession of the states of the River Plate interested in the free navigation of that River. On the 25th of February, 1864, these two countries subscribed a protocol concerning the employment of the fortifications made by Argentina on this Island.

In 1836, a war broke out between Chile and a confederation of Peru and Bolivia which had been formed in 1835 by General Santa Cruz, a confederation which aimed at securing the hegemony of South America and a predominant influence over the nearest states, Ecuador and Chile. Upon aid being given to the political refugees of Chile in Peru, in 1836, to prepare an expedition against Chile, this country declared war on the allied states and obtained the triumph of its cause in Yungai in 1839, with the dissolution of the confederation. Very reliable data exist, which lead one to judge that the English government was ready to support the chief of the Confederation, General Santa Cruz, who, in return for this, was to grant said government large commercial concessions. In this war Chile declared that it would follow three rules of International Law, which were favorable to neutral commerce: that neutral merchandise on board an enemy's ship could not be confiscated, that blockades must be effective, and that the flag covered the merchandise. And this, without requiring reciprocal

the attempts at confederation, the diplomatic disputes and the wars that have been waged, did not destroy the consciousness that they formed part of a family of nations that ought to draw closer together in friendship. The pacts which were signed for this purpose, called Treaties of Peace, Commerce and Navigation, bear the imprint of these fraternal feelings.

As a model for the draft of these treaties, the treaty celebrated by the United States with France on September 30, 1800, was used, after undergoing certain modifications and additions that were dictated by the pacts of confederation and the constitutions of the various states. These treaties often contain provisions for a defensive alliance and grant certain favors to the citizens of the respective countries on the subject of naturalization, and, especially, in matters of commerce, favors not granted to other countries. They also stipulate several ways of avoiding or deciding conflicts that may arise among them (as, a period to elapse and notifications to be given, before the beginning of hostilities, the acceptance of the good offices of a friendly country, and the invocation of the authority of special or general clauses of arbitration).[21]

The spirit of American fraternity has shown itself in certain parts of the legislation of several countries, above all in those relating to

treatment, that is to say, even though neutral nations did not recognize these rules.

In 1864, in consequence of civil wars, a war broke out between Brazil and Uruguay, terminating in 1865. That same year, by the Treaty of Alliance of the 1st of May, Brazil, Uruguay, and Argentina bound themselves together to declare war against Paraguay to overturn the government of that country. These three states contracted the treaty obligation of respecting the independence, sovereignty, and integrity of Paraguay (art. 6), but in article 16 it is stipulated that the allies would cause the government of Paraguay to conclude with them boundary treaties on the bases indicated in the Treaty of Alliance. In the final Treaty of Peace, of February 3, 1876, between the Argentine Republic and Paraguay, are to be found provisions which aim to secure the free navigation for the commerce of all nations of the rivers of Uruguay, Paraná, and Paraguay.

[21] In some, the parties promised not to celebrate treaties of peace and friendship with the Spanish government until it had recognized the independence of all the states of America formerly Spanish, or, at least, of the signatory states (Treaty of Peace, Friendship, Commerce and Navigation between Chile and the United States of Mexico, of March 7, 1831, Art. 15).

nationality,[22] and in the protests which have been raised when any one of them has been the victim of a war or of armed intervention on the part of a European power.[23]

VI

With this outline of the fundamental features of the political relations of the Latin-American states with each other, and postponing to the second period the study of the policy developed by the United States in Latin America as a whole, let us now turn to an examination of the relations of this part of the world with Europe.

If the Latin countries of America were determined to reject the domination or intervention of Europe in the New World, they perceived the importance, at the same time, of binding themselves closely to the Old World with which they entertained more active relations than with many of their sister states of the same race and continent. Thus it was that during the first years of independence, their foreign policy was inspired by the general purpose of cultivating closer relations with all the countries of Europe, including the mother country.[24]

In 1836, Spain, without recognizing the independence of the new states, re-opened commercial intercourse with many of them on the basis of reciprocity. With the other states of Europe and with the United States, the Latin Americans began soon after their independence to make treaties known as Conventions of Peace, Friend-

[22] As to this, *see*, Alvarez: "La Nationalité dans le Droit International Américain" Paris, 1907), No. IV, pages 17 and 18.

[23] For example, the French intervention of 1838 and the Anglo-French intervention of 1846 in the River Plate; the French intervention in Mexico in 1862; the war of Spain in the Pacific in 1864–1866, and various cases of the suppression by Spain of the attempts of Cuba to free itself.

[24] In spite of the fact that the domination of Spain had completely ended in America with the battle of Ayacucho, in December, 1824, it was not until December 4, 1836, that the Córtes passed a law authorizing the Spanish government to celebrate with its former colonies of America treaties of peace and friendship on the basis of the recognition of their independence. The first state recognized by Spain was Mexico, (Treaty of December 28, 1836). The others were almost all recognized after 1844. When this law was passed, the governments of nearly all the new republics, although already recognized by the other countries, believed it wise to open up the negotiations with the mother country in order to avoid all doubts as to their international relations with the latter.

ship, Commerce, and Navigation. In these, the stipulation relative to peace and friendship constituted the characteristic feature.

These conventions were modeled upon the already cited treaty of the 30th of September, 1800, between the United States and France, but contained modifications which breathed the liberal spirit which had hardly made its appearance in Europe. The principal innovations these treaties introduced consisted in more completely assuring commercial liberty, which, in the economic situation prevailing, was what was most needed by these countries; in declaring that the citizens of one country should have in the territory of the other state the same rights as the citizens of the latter; in regulating with greater detail the principles of maritime law that should be in force in time of war; in specially prohibiting their citizens from accepting "letters of marque" of a country at war with any one of the contracting parties on pain of being treated as pirates.[25] Those treaties further contain a "most-favored-nation clause" and in some of them, especially in those of early date, it is provided that this clause does not include those favors which have been or may be granted by Latin-American countries to each other in view of their common origin.[26] And, as a means of avoiding conflicts, it is stipu-

[25] The reaty of 1800, famous for the above reasons in American diplomatic history and because it suggested the provision of the Treaty of Commerce signed in the Congress of Lima in 1848, proposed to assure the liberty of commerce not only in times of peace, on the basis, then, of the privilege of the most favored nation (arts. 6 and 11), but also, and chiefly, in the case of war. For this case, the liberty of commerce of neutrals was stipulated, except in contraband (art. 12), enemy's goods in ships of the nationality of one of the parties is not to be confiscated unless it be contraband, but neutral goods in an enemy's vessel may be confiscated, unless it had been put aboard before the declaration of war, or afterwards, in ignorance of this event (arts. 14 and 15); a list is given of the articles of contraband (art. 13); the right of visitation is regulated (arts. 16 to 22) and the exercise of privateering (arts. 23 to 27). No way to avoid conflicts between states is specified, but the conduct to be observed in case of conflicts is indicated, a certain period being fixed during which the citizens of each country will be able to freely abandon the territory of the other (art. 8).

[26] See the protests made against this by the Secretary of State, Henry Clay, through the Minister of the United States in Mexico, which were directed to the Mexican Government because it refused to grant the United States the same favors as those granted to other American States. Hart, "American History Told by Contemporaries," Vol. III, pages 500 and 501.

lated generally that no one of the contracting parties may order or authorize any act of reprisal nor declare war against the other because of offenses or damage suffered, without first presenting a list of grievances to the other, reinforced by reliable proof and testimony, in which justice and satisfaction is demanded, of which the other party refuses or unreasonably postpones consideration. However, in some of the treaties, arbitration is established with the same purpose, but this arbitration is almost always restricted closely to the matters which are the object of the treaty.

In spite of the efforts of the new republics to maintain cordial relations with Europe and the United States, this period was not free from difficulties, some of which were of considerable importance. Some of these controversies involved territory and turned on the question of right to exercise sovereignty in a certain stretch of country; e. g., the controversy between England and the United Provinces of the River Plate on the occupancy by the first of the Falkland Islands in 1823; that between Haiti and the United States because of the latter's taking possession of the Island of Navassa in 1856;[27] and between Venezuela and Holland as to the possession of Aves Island.[28] Others had their seat in boundary matters, as in the conflicting claims of France and Brazil as to the line between French Guiana and the Republic,[29] and of England and Venezuela on the frontier separating British Guiana and the latter country.[30]

On the other hand, the above countries in their relations with the Latins of America pursued a policy sometimes of armed intervention, in spite of the Monroe Doctrine, and at other times of protection of

[27] As to this little known controversy, see Moore: *op cit.*, Book I, § 81, pages 266–267.

[28] By the Convention of 1857, this controversy was submitted for decision to the government of Spain, which, on the 30th of June, 1865, gave a decision entirely favorable to Venezuela.

[29] By Convention of April 10, 1897, submitted to the Swiss Confederation for arbitration. The arbiter gave decision, April 1, 1900, in favor of Brazil.

[30] This controversy, involving the possession of 109,000 sq. kilometres, is notable in American diplomatic history as being one of the clearest cases of the exercise of the hegemony of the United States, as we will see later on.

France and Holland also had a dispute as to the delimitation of Dutch Guiana, which was brought to an end by the award of the Czar of Russia on May 13–25, 1891.

the interests of their citizens, adopting the procedure followed against the weaker states of Europe or semi-civilized countries — a policy growing out of the unfavorable opinion held as to the character of the international affairs of these states, almost all of which were infected by institutional instability and even anarchy. The United States, although feeling the solidarity of continental interests, judged Latin America in the same fashion as Europe and adopted a similar policy in this regard.

The conflicts caused by this policy of Europe and of the United States may be divided into *personal, financial,* and *political* groups.

The *personal* conflicts refer to claims arising from injuries received by individual citizens of those countries because of tumults or civil wars.

The *financial* group consists of claims growing out of damages or prejudices suffered by the property of said citizens, resident or non-resident in America, because of forced loans, confiscation, failure of the payment of coupons of the public debt, or for material injuries sustained as a consequence of civil or international wars, and the like.

The *political* cases are made up of the use of force against these states, either attacking their independence and sovereignty or compelling them to satisfy claims presented against them. In 1838, France intervened, establishing a pacific blockade, in the River Plate and in Mexico, declaring in both instances that she was not then committing an act of war.[31] In 1842, 1844, and 1851, England directed blockades against the coast of Central America, and asserted claims to the protectorate of the Mosquito Coast, Nicaragua. In 1845, France and England intervened forcibly in the struggle of the dictator Rosas with the Republic of Uruguay.[32] In 1861, Spain

[31] In the first case, France justified her action in alleging the injustice of a law of the Argentine tyrant Rosas who attempted to naturalize and force to do military service foreigners residing for more than three years in the country and engaging in commerce or possessing real property. On this occasion, France interfered in the internal affairs of Argentine Republic and Uruguay. The conflict was ended by a compromise of the parties on October 29, 1840.

The second case involved the payment of a pecuniary claim. France blockaded the port of Vera Cruz, and took the fort of San Juan de Ulloa, whereupon Mexico declared war. Peace was established by the Treaty of March 9, 1839.

[32] On the 24th of November, 1849, a treaty was celebrated between England

re-incorporated Santo Domingo into its colonial empire.[33] In 1862, France, under the pretext of protecting a financial claim, entered Mexico and established a monarchy. In 1864–1866, Spain waged a war against Chile and Peru.[34] As to the acts of hostility of the United States, the principal are: the war of 1846 with Mexico,[35] the bombardment and burning of Greytown or San Juan del Norte in Nicaragua in 1854, and the expedition of 1859 against Paraguay.

These three classes of conflicts (personal, financial, and political) have been settled either by the Latin States submitting to the demands of the claimant nations when these were powerful, or by compromise or by arbitration.[36]

and Argentine Republic, which put an end to the English intervention in that country. In this, there is a curious clause stating that Argentina is in the full enjoyment and exercise of all the rights possessed by an independent nation. This article was included in the treaty on the petition of Rosas who complained that the European powers denied to the Latin-American states the sovereign rights which they themselves possessed.

[33] Its independence was again recognized by Spain in 1865.

[34] The cause of this war clearly shows the international situation in which, Spain maintained, the new republics that she had not recognized, found themselves. In 1864, she sent to the Government of Peru, which was in this situation, a "Special and Extraordinary Commissioner of the Queen", a title borne by the former inspectors charged with the supervision of affairs in the colonies. The Peruvian government declined to receive this individual save in the character of Confidential Agent. The envoy abandoned the country, and a Spanish fleet seized the Chinchas Islands, belonging to Peru, on the grounds of re-asserting its rights of possession. Spain alleged, in fact, that, as it had not recognized the independence of Peru, that only a state of truce existed between the two countries since the time of the struggle for independence. On the 5th of December, 1865, a Treaty of Alliance was entered into by Peru and Chile to repel the agressions of Spain, an alliance which was entered into a little later by Bolivia and Ecuador. Chile, whose independence had been recignized by Spain in 1844, found herself involved in this war, owing to which the Spanish squadron blockaded and bombarded the port of Valparaiso. This act has given rise, among others, to an interesting question of International Law, as to what extent the bombardment of a purely commercial port entirely without fortifications is permissible.

On this occasion Spain gave assurance to the United States that the purpose of the war was not to change the republican character of these countries.

[35] This war came to an end by the treaty of February 2, 1848, by which the United States annexed New Mexico and California.

[36] Frequently, above all in case of numerous claims, it is stipulated that these be decided by Arbitral Tribunals or by Mixed Commissions. This procedure has lent itself to abuses, because of which it is disappearing.

These cases imply a fourfold violation of the general principles of International Law. The first, an exceptional occurrence, meant an unjust declaration of war or the forcible and insufficiently justified interference in the domestic affairs of these countries. The second, which consists of frequently occurring cases, consists of making claims for damages whenever citizens have been injured, especially by wars or revolutions. The injury is always alleged to have been due to the action of the government against which the claim is made, in spite of the fact that the latter could not be called to account because the acts had been done within the limit of its sovereign rights or, if such action had been abusively perpetrated by its citizens, it could not have been foreseen or guarded against by the state. The third is also very general and consists in taking up diplomatically all those claims which can be asserted against the Latin-American governments, even those which the interested parties should bring before the ordinary courts of justice. The fourth is to use force, such as the seizure of customs houses, pacific blockades, etc., in order to compel the recognition of claims. Comparing the intervention of the great powers since 1810 in the affairs of the weaker states of Europe with those exercised by them in Latin America, we find that in the former case they were inspired by the dictates of broad policy, humanity, or religion, while in the latter they acted with the sole purpose of assuring unduly for their citizens who came to those countries a specially privileged situation.

CHAPTER SECOND

I

In the second period of the history we are outlining, which runs, as we have said, from the middle to the last third of the nineteenth century, the international life of the Latin-American countries presents in several particulars an aspect quite different from that observed during the preceding years, and consequently its contribution to the development of International Law is different.

The idea of the confederation of all or of a part of Latin America, was abandoned as impracticable, principally owing to the fact that the fear of European conquest no longer existed. But as the states

still counted themselves as members of the same family, they strove to strengthen the bonds of friendship and commerce while regulating uniformly the juristic relations in many of the matters which are included in Private International Law; a uniformity which it is not difficult to obtain in view of the close analogy existing between their institutions owing to the fact of a common origin. In this period, therefore, the notion of solidarity does not disappear, but becomes modified and directed toward more practical ends which are more in keeping with the international life of these countries.

In 1877, there met in Lima, on the initiative of the Government of Peru, a congress of jurists of Latin America who labored to establish uniform rules of Private International Law. Two conventions were signed here, one on the above subject and the other on extradition, which were subscribed to by Argentina, Bolivia, Chile, Costa Rica, Ecuador, and Peru. The protocol on extradition was subscribed to, further, by Guatemala and Uruguay.

On the 3rd of September, 1880, the representatives of Chile and Columbia, in Bogota, signed *ad referendum* a convention of general, permanent, and absolute arbitration. In article 2, it was provided that the arbiter should be designated in a special convention, or, in default of this, the arbiter should be the President of the United States. In article 3, it was stipulated that both Governments should try to make similar treaties with the other countries of America " in order that the solution of every international conflict by means of arbitration may come to be a principle of American Public Law." [37]

With this purpose, the government of Columbia addressed a circular to all the Latin-American governments inviting them to meet in a conference in Panama in 1881 in order to sign there pacts similar to those entered into with the government of Chile. Only Brazil, at that time an empire, was omitted from the list of those invited. Almost unanimously the governments accepted the invitation. Mexico refused its adherence on the score that she did not deem it wise to

[37] In various conventions of Latin-American States, such expressions as "American Public Law" and even "South American Public Law" are to be found (*See*, Preamble of the Treaty of April 20, 1886, between Peru and Bolivia on the fixing of boundaries), which manifest the solidarity of interests which is believed should exist between all the states of Latin America.

pledge herself to such wide principles of arbitration. The Argentine government declared, in a note dated the 30th of December, 1880, that, in its concept, the projected conference should not limit itself to the signing of a treaty of arbitration, but should proclaim several principles of American Public Law as the best method of securing the solidarity of the countries of the continent. The principle which, above all others, it desired to see proclaimed, was that guaranteeing to all the states of Latin America their territorial integrity. This was not a new idea. It had already been expressed in the pacts of Confederation and Union of which we have already spoken, and the Argentine government itself had rejected it in a note replying to an invitation to adhere to the Treaty of Commercial Union of Santiago, 1856.[38] Only the representatives of Guatemala, Salvador, and Costa Rica assembled at the time the Congress convened, whereupon the assembly was dissolved.[39]

On the occasion of the centennial of the birth of Bolivar, in 1883, the representatives of several American republics met in Caracas. There they signed a document which, conceived in the lyric vein of the first period, proclaimed certain principles of American public law among which was the recognition of arbitration as the best method of settling international disputes.

In 1888, the Governments of Uruguay and Argentina invited the Latins of America to an international congress to meet in Montevideo in order to draw up a treaty on the subject of the various matters of Private International Law. Almost all the states of Latin America took part in this meeting and signed conventions concerning civil law, commercial law, penal law, the law of procedure, copyrights, trademarks, patents, and the exercise of the liberal professions. It does not come within the limits of this article to touch

[38] In emitting an opinion in 1880 which was different from that of 1856, the Argentine Republic obeyed a political purpose, — that of preventing Chile (at the time, victorious over Peru and Bolivia) which maintained strained relations with it on account of a boundary dispute, from annexing a portion of Peruvian territory.

[39] The government of Chile, in view of the fact that the projected conference was intended principally to meddle in its foreign policy, not only refrained from ratifying the cited convention of 1880 and from participating in the Congress, but succeeded in prevailing upon several Latin states not to attend it.

even lightly upon the principles contained in these conventions which incorporated the most liberal doctrines proclaimed by European publicists on the matters involved. But it may be said in passing that the states of America, in signing these conventions, agreed that because of the fact of their common origin and interests they could come to a general understanding regarding many matters which could not be accepted by the world in general. Although these treaties were not ratified by all the signatory states, yet they have exercised a considerable influence in the mutual relations of these countries in these matters, while perceptibly contributing to the development of International Private Law.[40]

In this period, more than in the former, the Latin-American countries agree upon arbitration, either general or special to the subjects of the treaty, as a means of deciding controversies arising between them. In spite of the similarity of national interests, this period presents the same elements as the former to menace their reciprocal relations — civil wars, boundary disputes, quarrels arising out of questions of the navigation of rivers, and wars between the countries themselves. An attempt is made to prevent the occurrence of civil wars by treaty agreements to adopt energetic measures against all efforts to organize in the territory of the one, revolutionary movements against the other contracting party. Further, any interference of the states in the domestic affairs of the others because of these wars, is prohibited by agreements that possess real practical importance.[41] Many of the boundary questions of this period were, as in the former period, settled by arbitration.[42] Among the wars

[40] These treaties have been ratified by Argentina (law of December 11, 1894), by Paraguay (law of September 3, 1889), by Peru (law of October 25, 1889), by Uruguay (October 1, 1892), and by Columbia (Decree of November 17, 1903). By virtue of a provision of those pacts permitting states which had not signed them to adhere to them later, France, Spain and Italy and Belgium became parties to the Treaty on Copyrights, during 1896, 1899, 1900, and 1903, respectively.

[41] See the agreement between Argentina and Uruguay, of January 14, 1876, which was not ratified.

[42] One of the principal contests was that between Argentina and Paraguay as to the possession of the territory between the River Verde and the main branch of the Pilcomayo together with the Villa Occidental, submitted by the Convention of February 3, 1876 (art. V) to the decision of the President of the United States of America, who handed down his judgment on the 12th of November, 1878.

then waged, that fought in 1879–1885 by Chile against Peru and Bolivia united by a secret treaty of alliance signed in 1873, is the most important as it radically modified the map of the western portion of America [43] and has even up to the present day given rise to interesting problems of International Law that were scarcely known before, at least, in the same clear-cut form. Some of these problems involved the question of the rights of a belligerent in enemy territory occupied by his arms; the limits to the authority of the victor in territory which the losing party has turned over to him by an act of truce or of peace, in full sovereignty but not finally; the value to be given by the victorious state to the concessions made by the conquered power to private parties over a tract of territory ceded by a treaty of peace; the value of security which had been given by the conquered state over the same territory in order to guarantee financial obligations; the moral or legal responsibility of the annexing state as to foreign creditors of the state annexed; and, finally, concerning the arrangements for the taking of a plebiscite to decide the nationality of territory.

[43] Upon declaring war, the government of Chile published in the *Diario Oficial* (October 10 and 20, 1879) the instructions which the United States issued for its armies in the field, as well as the declarations of several European international conferences (Brussels, Geneva, and St. Petersburg) on the laws and usages of war. These were given as a guide for the conduct of the Chilian army during the operations of war. The war was closed, as to Peru, by the treaty of October 20, 1883. By article 2 of this treaty, Peru ceded to Chile the province of Tarapacá and by article 3 placed Tacna and Arica under the sovereignty of Chile, postponing for 10 years a plebiscite which should decide the final sovereignty over these provinces. The plebiscite has not been taken, because the parties have not been able to agree as to the conditions under which it is to be celebrated. Respecting Bolivia, the war was suspended by the truce of April 4, 1884, according to which the territories lying between parallel 23 and the mouth of the River Loa in the Pacific, which had been occupied by the military forces of Chile during the war, should continue subject to the sovereignty of Chile. The final treaty of peace was arranged on October 20, 1904, in which the sovereignty of Chile over this region is recognized. Chile has been reproached without reason for having occupied these territories without a previous declaration of war. In fact, this country, after seeing that Bolivia rejected the offer of arbitration, not only addressed to Bolivia an ultimatum, but proceeded to occupy this zone of territory on the grounds of *rei vindicatio* inasmuch as Bolivia had violated the treaty of 1866, the purpose of which was to put an end under certain conditions to the old boundary dispute between the two countries as to parallels 23 and 24.

II

As to the relations existing between the Latin-American countries and Europe, the intercourse grew closer and more frequent. The reason for this was that Latin America felt a growing need not only of the culture and the intellectual material and the commerce of Europe, but also of its capital and population to develop its wealth and populate its territories. Because of the above, these states concluded with those of the Old World numerous conventions, and adhered to many of the conventions of general interest concluded by the European states among themselves, especially the International Unions, thereby giving to these Unions a world character.

Two factors which should serve as most powerful bonds between the two continents (the attraction by America of European capital and population) have given rise to a certain antagonism of interests between the two centers, producing problems *sui generis* in International Law. This antagonism has developed over the question of immigration. For, it is to the interest of the American states, colonizing their own territory, to bring from Europe the greatest possible number of skilled workmen fitted to develop the industries of the country; and on the other hand, it is to the interest of the European states that this desirable element should not leave their territory. And so serious is this antagonism that, in proportion as the immigration to the American states increases and the governments of these countries organize in Europe special service for attracting it, the European countries establish fresh conditions tending to prohibit or at least restrict the emigration of the desirable laboring element.

Nor is this all: on the question of the nationality of the children of immigrants, born in America, the interests and ideas of the two worlds are equally antagonistic. For, according to the principles of *jus sanguinis*, followed in nearly all European legislation, the children of those immigrants keep the nationality of their parents; whereas, according to the legislation of the American countries, they take the nationality of the country in which they are born. The Latin-American states, in effect, desire that the descendants of foreigners, born within their territory, be incorporated in those states,

become a component part of the ethnic element and contribute to form the population. With this end in view, these states have established, not only in their laws, but in their constitutions, the principle of *jus soli* as the basis for determining nationality. And it is almost impossible to reconcile these laws, owing to the necessity these countries have of increasing their population.[44]

Further, the enormous development which colonization by immigration has taken in certain Latin countries, and the manner of organizing the movement, has resulted in turning over great stretches of territories to the newcomers, large districts of which are thus peopled almost exclusively by Europeans of the same nationality. It has come about because of this curious circumstance, that the countries to which these immigrants belong consider some of these regions almost as their colonies, and pretend to exercise an influence, morally at least by their schools and similar institutions, to keep alive in them the love of the mother country. In this may be found the germ of possible conflict of a political character between the two continents.

As to foreign capital, the investments have been made not only in commerce, but also in loans for speculation. These loans have produced interesting and peculiar problems relating to the responsibility of the debtor state and the nature of the security given to guarantee the obligations. Capital which sought speculative investment has often been employed in buying large tracts of land over which the capitalists pretended to exercise wide authority, to the derogation of the sovereign rights of the state in which the lands were located. And this is not all: some states, in order to secure European capital, have sold or leased portions of territory to foreign syndicates, granting them, in the latter case, certain attributes of sovereignty, which has created serious international problems involving the value or import of this peculiar class of conventions.[45] Outside of these

[44] As to the importance of this matter, the problems involved in it, and the several solutions given to the problems by the laws of Europe and America, *see* Alvarez: "La Nationalité dans le Droit International Américain," Paris, A. Pedone, 1907.

[45] The most characteristic case is the concession made by Bolivia, by the law of December, 1901, to a North American syndicate, of a portion of the Acre terri-

special relations from which several complex problems have grown, there have arisen also conflicts which although less serious than those giving character to the former period, have yet been numerous. These are based principally on the diplomatic claims urged by European nations for their citizens, claims which have been usually flimsy and unsupported by sufficient proof.[46]

In order to put an end to these abuses, the countries of Latin America have entered into treaties with Europe in which it is provided that a state is not responsible for injuries suffered by the citizens of a foreign country in case of civil war, unless the constituted authorities have been guilty of negligence in the suppression of it; and that every claim of a legal character which is brought by the citizens of one state against the government of another must be presented to the competent authority of the latter country, the state to which the claimant belongs, not being able to protect him diplomatically except in the event of a denial of justice.[47]

III

It is important now to turn to a consideration of the international policy pursued by the United States in relation to the Latin countries of the New World, in order to complete the picture we are making of

tory, the title over which Bolivia disputed with Brazil. Brazil protested against the concession, and the controversy ended by the already mentioned treaty of Petropolis, by which Brazil paid indemnity to the syndicate whose concession was taken away. *See* Moore: *Op cit.*, Vol. VI, pages 440–442.

[46] Among these claims it is well to cite what arose between Italy and Columbia because of the confiscation in 1885 by the government of the Republic, of the property of the Italian subject Cerruti; this claim was settled by the Convention of August 18, 1894, by which the matter was submitted for decision to the President of the United States, who rendered his decision March 2, 1897.

[47] Treaty of December 5, 1882 (art. 18), between Mexico and Germany; treaty of July 29, 1885 (art. 21), between Mexico and Sweden and Norway; treaty of November 27, 1886 (art. 11), between Mexico and France; treaty of April 16, 1889 (art. 12), and of April 16, 1890 (art. 12), between Mexico and Italy; treaty of July 23, 1892 (art. 20), between Columbia and Italy; treaty of June 7, 1895 (art. 15), between Mexico and Belgium; treaty of September 22, 1897 (art. 16), between Mexico and Holland.

It is worthy of note that neither England nor the United States have ever wished to conclude treaties of this kind with Latin-American states. These states have, however, entered into treaties of this nature with each other. For a

the characteristic traits of the international relations of those countries. This policy may be examined from the standpoint of the extension in America of the territory of the Union, in the relations of this country with the separate republics of Latin America, or, finally, in its bearing on the whole American continent. It is not incumbent upon us to study that increase of territory which forms a part of the imperialistic policy of the United States,[48] nor will we turn back to review those interstate relations in which, as we have seen, the United States adopted the attitude of Europe in looking down with disdain upon the new nations. We will on the other hand trace the general lines of the policy of the United States in the last phase, that is, in its relation to the American continent considered as a whole. We will study this policy by bringing together in a single picture the three periods in which we have divided the diplomatic history of the Latin-American Republics. In this manner, we shall be able to understand its origin, object and import, as well as its importance under the point of view of International Law.

We will begin by passing rapidly through the mass of messages and correspondence of the Presidents of the United States, from Washington to Monroe, in order to trace to their first manifestations the ideas and sentiments of that country as to the other states of the American continent.

Washington, in his Farewell Address, said that the interests of Europe differ from those of the United States and that the "detached and distant" situation of the latter invite and enable it to follow a different line of policy.[49] In 1808, Jefferson, then President, said

list of these cases, *see* Alvarez: "L'Histoire Diplomatique des Républiques Américaines" in the "Révue de Droit International Public," Vol. IX, page 563, note 1.

[48] While the territorial history of the Latin states reduces itself to a struggle over boundaries, that of the United States is that of the extension of territory. *See*, as to this expansion of the United States, Viallate: "Essais d'Histoire Diplomatique Américaine" (Paris, 1905), pages 3–56. In this growth, Latin countries on the south and west were absorbed. The contribution which this element has made to the culture of the great republic has never been properly studied.

[49] Richardson's Messages, 1:222, cited by Foster: "A Century of American Diplomacy" (1901), page 439.

to the Governor of the Territory of New Orleans, that the interest of Cuba and Mexico as well as that of the United States is "to exclude all European influence from this hemisphere." [50] In 1820, when the independence of Latin America was practically assured, Jefferson alluding in a private letter to a conversation with the minister of Portugal in Washington, said: "From conversations with him, I hope he sees, and will promote * * * the advantages of a cordial fraternization among all the American nations, and the importance of their coalescing in an American System of Policy, totally independent of and unconnected with that of Europe." [51]

It is curious, too, to follow through the messages of Monroe from 1817 to 1823 the same first manifestations and the evolution of a policy as to the states of the New World which were beginning their independent life. On the 2nd of December, 1817, Monroe calls attention to the fact that "through every stage of the conflict the United States have maintained an impartial neutrality, giving aid to neither of the *parties* in men, ships, or munitions of war. * * * ." [52] Two years later, although persisting in a strict neutrality, the President declared that "this contest has from its commencement been very interesting to other powers and to none more so than to the United States. A virtuous people may and will confine themselves within the limit of a strict neutrality; but it is not in their power to behold a conflict so vitally important to their *neighbors* without the sensibility and sympathy which naturally belong to such a case." [53] In 1820 and 1821, he declared that he was disposed to repeat the "friendly council" already offered by his Government to Spain in order to bring about an "adjustment between the mother country and the colonies on the basis of the independence of the latter." In 1822, the Congress of the United States passed a law recognizing the independence of Mexico and

[50] Writings of Jefferson, 9:213, cited by Foster, *op cit.*, page 440.

[51] Jefferson's Works (1854), 7:168, cited by Foster, *op. cit.*, pages 440 and 441.

[52] Hart: "American History Told by Contemporaries" (1902), Vol. III, page 496. In a note of January 19, 1816, to the Spanish Minister de Onis, Monroe considered the Latin-American Republics as belligerents.

[53] Hart, *op. cit.*, Vol. III, page 495.

of the other countries of South America. Therefore, the belligerents of 1817, after becoming "neighbors and fellowmen" of the United States in 1819, are denominated in 1823 "our southern brethren * * * whose independence we have on great consideration and on just principles, acknowledged."

In 1823, a new era opens in the policy followed by the United States in its relations with the rest of America. That republic then understood that it was bound to the other states of the hemisphere not only by reason of being neighbors, but because of a continental solidarity in everything pertaining to the independence and sovereignty of the new nations. In that year, under historic circumstances known to all, Monroe, while having primarily in view the interests of his country, expressed and epitomized in such a clear manner the essence of the international situation of the New World, that his declaration became, as we have already said, although he did not aim to formulate an invariable norm of international policy, the Gospel of the New Continent.[54] This message, which declares that the political system of Europe is different from that of the American states, contains declarations which may be epitomized in the following points:

1. The states of the New World are entirely independent and sovereign.

2. And, consequently, the régime of the balance of power and intervention, the basis at that time of the international politics of the Old World, can not be extended to them. European intervention is condemned, not only when its object is to change the form of government adopted by the states, but when it aims to oppress them or to control their destinies in any way.

3. That the states of Europe can not acquire by occupation any part of the American continent.

Together with these three explicit declarations, there are three

[54] For this reason the doctrine contained in these declarations has subsisted up to the present time, when it is being applied and interpreted, while other declarations made subsequently in various messages by other presidents of the United States and referring to important American affairs have been completely forgotten.

others of a more or less explicit character which complete the "doctrine:"

1. That respecting the colonies of Europe then existing in America.

2. The political equality of the states of the continent, particularly from the point of view of their independence which therefore negatived the right of any to interfere in the internal affairs of another.

3. The non-interference of the United States in the domestic affairs of Europe, save when they constitute a menace for the independent existence of America.

On declaring the intervention of Europe in America is not to be tolerated and that the American continent is not open to European colonization, Monroe contradicted two principles of International Law at that time in force: that of intervention and that of the acquisition by occupation of the territories that were *res nullius*. The contradiction of this second principle is particularly important, as it in reality amounted to establishing, that, in America, all territory, even that which was not explored, and which was consequently *nullius* (and in this condition there were vast stretches of country), was subject to the sovereign authority of the American country within whose limits it was located during the colonial epoch. The view is obtained on the basis that the territory of this continent has already been distributed among the states of America, and that each one exercises real sovereign authority over all the land which belongs to it, even though the regions be totally uninhabited.

The Monroe Doctrine may be synthesized in this fundamental idea: *no one of the two continents may intermeddle in the affairs of the other,* and on this all America stands united.

On recognizing that a solidarity of interests as to the continuance of their independence existed between the states of America, Monroe did not do more than serve as an echo of the sentiment that then predominated in all the republics. Therefore, whether the famous message of 1823 had been written or not, the principles contained in it would always have been sustained in the New World In this sense, it may be said, and not without a certain amount of truth, that the Monroe Doctrine is neither *doctrine* nor *of Monroe.*

But that which constitutes its undeniable merit and makes it famous, is that such an exact synthetic statement of the destinies of America should have been given thus early in the period of emancipation, by a people whose increasing power would not permit the rest of the world to regard that statement as merely Utopian. It was this that enabled America, from the very beginning of independent life, to give to its foreign policies a safe norm instead of the vague ideas then existent on these subjects. In this sense the Monroe Doctrine is *doctrine* and is *of Monroe*.

The best proof of the statement that the Monroe doctrine expressed the aspirations of all America, is to be found in the fact that from the date of the Congress of Panama of 1826, all the Latin-American states have not only striven to proclaim it solemnly but also to unite to make it respected; the resolutions passed by this congress and by the others of this period, not only agree with it and clearly show the effect of its influence, but make an effort to extend it; a similar influence is seen to have been exerted by this doctrine upon the conventions celebrated by the Latin states with one another.[55]

The solidarity of the American continent only aimed to repel the interference of Europe and not to isolate the hemisphere from the civilization of the Old World, a pretention which would have been absurd, in view of the fundamental differences between the two groups of American nations, each one of which had closer intercourse with Europe than with the other, as the civilization and commerce of Europe furnished elements of life and culture to both.[56]

[55] This doctrine exerted a palpable influence in the treaty of January 2, 1859, between Brazil, Argentina, and Uruguay, relative to the recognition of the independence of the last-named country (art. V).

[56] The contradiction which Secretary Clay reproached Mexico with in a letter of November 9, 1825, to Poinsett, Minister of the United States in that country, does not, then, exist. This letter states that Mexico considers the United States as a member of the American family of nations and invokes its protection when it believes that its independence is menaced by Europe, while placing the United States in the same category as Europe when the matter at issue is one of commerce, since it refuses to grant to the United States those special favors which it has given to other American states. *See* American State Papers, Foreign Relations, 2d Series, Washington, 1859, VI, pages 579–583, cited by Hart, *op. cit.*, Vol. III, page 501.

The determination of the New World to live politically independent of Europe, formed the basis of its international relations with the latter. The interference of Europe in America, of which we have spoken in a preceding section, did not arrest the development of this feeling of independence; on the contrary, it served to revive in the American states the desire of maintaining their independence.

After understanding the Monroe Doctrine in the above manner, that is to say, as the happy expression of the idea as to the peculiar situation which the New World should hold in the community of nations, it becomes idle to discuss, as has been done by some publicists, as to whether or not it was formally proclaimed by the government of the United States; whether or not it has been recognized by the governments of Europe; whether or not it forms a part of International Law or is in conformity with reason and best policy.[57] It is the expression of the will of America, which all the states of the continent have wished to see carried out; and the United States, as the most powerful among them, has caused it to inspire in other nations the respect which the increasing power of that great republic has imposed.

Publicists have not only failed to see the real origin and nature of the Doctrine, but have disfigured its true meaning. For the majority of persons, it is the basis of the policy of hegemony which the United States is developing on the American continent. The writers, however, are not agreed as to the significance of this policy. The publicists of the Old World believe that the United States has repelled Europe from America only with the object of substituting its own influence for that of Europe. Anglo-Americans believe that the Monroe Doctrine is the sacred text which the United States should apply and interpret in its relations with the mass of Latin-American states; and the few publicists of these countries who have studied the Doctrine see in it a mere pretext for the gradual and progressive absorption by the great republic of the rest of the continent.

[57] Among other objections urged against the Monroe Doctrine, *see* the statements of Prof. Münsterberg of Harvard University, in Moore, *op. cit.*, Vol. VI, pages 528 and 529.

These points of view are inadmissible, since the idea of hegemony does not grow out of the Monroe Doctrine nor is its development dependent upon it: and the same objection may be made to the attempt to include within the category of "hegemony" every step taken by the United States in international policy in the American continent.

The hegemony of the United States is the fruit of the prodigious and rapid development attained by this country, outdistancing the other American republics, and the *de facto* recognition of this circumstance not only by the states of Europe but also by those of America. So it has been able to pursue a policy on the continent which may be considered from three different points of view and which has worked toward three different ends:

In the first place, the United States as the most powerful country in the western world, has maintained the Monroe Doctrine not only in the cases originally foreseen by it, but also (as in the case of the Monroe Doctrine, in looking to its own interest) has caused it to serve as an expression of the growing necessities and aspirations of the states of America, aiming to assure their independence and territorial integrity. In this direction it has aimed to maintain and develop the Monroe Doctrine.

In the second place, and keeping pace with the above, may be noted the effort of the United States to assert its material preponderance in the new continent, especially when there has been a question of its own interests.

Thirdly, with the purpose of protecting the states of America, it has taken active part in all the international questions of these republics that it believed to be of continental importance, particularly when the latter have become involved in conflicts with European states.

The following belong to the first category:

Cases involving the maintenance of the Monroe Doctrine: declaration of Secretary of State Buchanan in 1848, at the time of the attempt of General Flores to invade Equador;[58] declarations and attitude of the United States upon the French invasion of Mexico

[58] Moore, *op. cit.*, Vol. VI, page 473.

in 1862;[59] declaration of Secretary of State Seward, during the war between Spain and Chile-Peru;[60] protest of the government of the United States against the re-incorporation of the island of Santo Domingo by Spain.[61]

Cases of the development of the Monroe Doctrine: (a) To prevent the states of Europe from acquiring under any pretext, even with the acquiescence of the American countries, any portion of the continent, or from establishing a protectorate over any American state: declaration of Polk in 1848 as to Yucatan; declaration of 1895 upon the proposal of Nicaragua to cede to England Corn Island as a Naval Station; declaration of 1904 and 1905 in connection with the coercive measures of England, Italy and Germany against Venezuela.

(b) To prevent any European state from entering upon an occupation of a more or less permanent character, even as a war measure, of any part of the territory of an American country; declaration in 1840 by Van Buren that the United States would prevent by force the military occupation of Cuba by England; declaration of President Roosevelt at the time of the above-mentioned action of England, Italy and Germany.

The first class of questions can not be placed under the heading "hegemony of the United States." As in the case of the Monroe Doctrine, they synthesize and accentuate the sentiments of the entire continent. The United States as the most powerful of the states of America becomes the natural spokesman of the continent and charges itself with the duty of making their ideas respected, to the mutual advantage of all. This is proved not only by the fact of the logical extension of the Doctrine, but also because the points comprised in the first division of questions have been proclaimed by the Latin states in their congresses, as we have already seen. This view gains strength also through the circumstance that whenever the Latin states found themselves in any of these difficult situations, they turned to the Republic of the North for protection;

[59] *Idem*, pages 488 *et seq.*
[60] *Idem*, pages 445–446 and 507.
[61] *Idem*, pages 515–518.

and, finally, because these states have striven to discover new applications for the Monroe Doctrine such as the famous proposal of the Argentine Government, known under the name of the Drago Doctrine, regarding which we will have something to say later on.

To the second category belong:

(a) To prevent one European state from transferring to another, without the consent of the United States, the colonies it possesses on the New Continent: declaration of Clay in 1825, to the governments of France and England, to the effect that the Union would not permit Spain to transfer Cuba or Puerto Rico to a European country. President Grant later reaffirmed this.

(b) To present itself as the sole master and guardian of every highway between the United States and Panama to connect the two great oceans: Clayton-Bulwer Treaty of 1850. This treaty is "anti-Monroe" as it accepts the principle that a European power may have a word in American affairs, but the negotiations of the United States to abrogate the treaty [62] constitute manifestations of the leadership of the nation.[63]

(c) To intervene in the formation of new states in America whether their establishment be through act of emancipation, secession or otherwise (emancipation of Cuba and secession of Panama).

In the third category are to be found numerous well-known examples, among which it may be well duly to call to mind here the interference of the United States in 1895 at the time of the dispute between England and Venezuela as to the boundary of British

[62] For example, the declaration of Hayes in 1880, of Garfield in 1881, of Secretary of State Blaine in the same year, and the Hay-Pauncefoote Treaty of 1901.

[63] Moore, *op. cit.*, Vol. III, pages 130–262. In 1862 occurred another act of the United States which is "anti-Monroe." At that time, when Colombia asked the aid of the United States in accordance with the treaty of 1846, for the purpose of re-establishing order on the Isthmus of Panama, the Secretary of State (Seward) asked the governments of Great Britain and France to join the United States in taking measures to maintain freedom of transit on the isthmus. The two European governments declined the invitation. The government of Mexico protested to the government of the United States against the effort to introduce the intervention of Europe in American affairs. Mr. Seward in reply declared himself to share the opinion of the Mexican government, adding that the attitude of the United States had been incorrectly interpreted. (Diplomatic Correspondence [1863], page 1150.)

Guiana. In this intervention, which is a most characteristic act of hegemony, the discussion between the chancelleries of the United States and England on the Monroe Doctrine, involved the point advanced by Olney that American problems could only be solved by Americans. President Cleveland (message of December 17, 1895) invoked the Monroe Doctrine. The conflict was terminated by the Treaty of February 2, 1897, between England and Venezuela [64] which submitted the question to arbitration, and on the 3rd of October, 1889, almost the entire territory was adjudged British soil.

The second and third categories come properly within the limits of the idea of hegemony and not of the Monroe Doctrine,[65] to which, indeed, they rather run counter.

If the states of Latin America do not look with great favor upon the policy indicated under the second heading, they at least do not condemn it, providing it be pursued with reason and all proper moderation. As to the third category, these states not only do not reject it, but have sought and always will seek protection under it whenever it may operate to their benefit. But the circumstance that the United States has not always taken the lead with the necessary tact, has not at all times given its protection to the countries of America, and has held itself aloof with disdain from these repub-

[64] Moore, *op. cit.*, Vol. VI, pages 533–583.

[65] It is another error of publicists to confuse the leadership of the United States with imperialism, or, at least, not clearly to distinguish between these ideas. The former has to do exclusively with the politics of the American continent, while imperialism is the natural path followed to-day by all nations which have attained great military and economic progress, the end of which leads to the extension and development of commerce as well as political supremacy. It principally shows itself in the effort to obtain more territory, especially for colonies; to exercise more or less influence in the affairs of certain countries of Asia and Africa in order to procure markets favorable to the commerce of the foreign power, or to intervene in matters having to do with the European balance of power. According to this, the extension of the frontier of the United States, embracing Texas, California, and Puerto Rico, is imperialistic in character and not the result of acts of hegemony. The purpose of this study is not to show to what point imperialism destroys the principle of liberty and equality of all the states and how far this policy, which has exercised such a deep influence in the development of International Law, is justified.

lics until a late day, explains the dread they have felt of the hegemony of the Union, a fear fomented by the press and literature of Europe which represents the United States as preparing to absorb all America.

The extension given to the Monroe Doctrine and the hegemony of the United States, unlike the doctrine itself, have not been formulated as one piece nor at one time or in a solemn manner; on the contrary, they have grown little by little as circumstances have required them. And it is even more curious to note that the United States did not appeal to the doctrine during the time when it was strictly applying the principles contained therein, and that it has appealed to it when its application was not in point and when the act in question was one of hegemony (*e. g.,* in the above mentioned conflict between England and Venezuela).

The hegemony of the United States, as well as the Monroe Doctrine, has been attacked in Europe as lacking any basis in International Law. But the truth of the matter is that the leadership of the United States as well as the doctrine have been tacitly recognized by the states of Europe, which have been the first to turn to the United States in conflicts with Latin-American states. Further, the United States solemnly and emphatically re-asserted its determination in the matter in the first Hague Conference. This country then showed itself more firmly than ever disposed, according to the expression of one of its delegates, "to maintain this policy and the Monroe Doctrine, in its later *approved and extended form,* carefully and energetically." [66]

It may be said regarding the position of hegemony of the United States, that it has usually asserted itself in efforts to prevent civil wars in countries on the shores of the Gulf of Mexico. Only one case is to be found where it has acted in the rest of the continent: viz., in oppsition to the restoration of the monarchy in Brazil, in 1893–1894.[67]

[66] Holls "The Peace Conference at The Hague" (New York, 1900), pages 270–272. Compare "Rapport de la Délegation Française," page 40, cited by A. Mérignhac: "La Conférence Internationale de la Paix" (Paris, 1900), page 337.

[67] Moore, *op. cit.*, Book II, pages 1113–1120.

It may be further said that its manifestations have not shown the same intensity in every part of the continent: it has been much more effective in countries lying close to the United States than in those that are more distant. The interference of the northern republic has been particularly marked in countries situated on the Gulf of Mexico (Cuba, Panama Canal, secession of the Republic of Panama, boundary dispute between Venezuela and England). However, there is one case on record where it not only did not desire to intervene but when it refused to do so after having been called upon for assistance — in the matter of Lueders out of which grew the difficulty between Germany and Haiti. On this occasion Secretary of State Sherman declared that the Monroe Doctrine did not compel the United States to be involved in the continual conflicts between American republics and other nations.[68]

As to the countries situated south of the equatorial line, the leadership of the United States has hardly ever been asserted, owing to the small interests the Union has in these regions, the difficulties of distance, and the more perfect organization of the governments there, which has not made it necessary to interfere in their relations with foreign powers. On several occasions, the United States refused to intervene: as, in 1881, at the time of the war between Chile and Peru, when it declined to join France and Great Britain in order to put an end to hostilities,[69] and, in 1897, in the boundary dispute between Chile and Argentina.[70]

The hegemony of the United States, above all, according to the significance it has in the third division, is comparable to the system of "balance of power" which was exercised in Europe by the Great Powers, though the two notions are by no means to be confounded. Far from deserving absolute condemnation, as has been lightly said by certain publicists, it should be differently judged, as having been generally beneficial to America, as it has made this hemisphere respected by the countries of Europe in spite of the acts of intervention that have been carried out against it. But,

[68] Moore, *op. cit.*, Book VI, page 475.
[69] *Idem*, Book VI, page 508.
[70] *Idem*, Book VI, pages 435–436.

if this hegemony is not more burdensome than the European "balance of power," its application possesses this one defect, however — that, being exercised by a single country it is not subject to proper control. Consequently it will never have the prestige and moral weight that is enjoyed by the former.

The conclusion which we reach is that the Monroe Doctrine with the extension of its principles, as well as the policy of hegemony, gives yet another characteristic touch to the international relations of the states of the New World, and, is, consequently, of great importance to International Law.

The Monroe Doctrine, far from being a thing of the past, as some publicists pretend, is still of present importance in the sense that it denies the existence of territories "*nullius*" in the American continent, territories which could be acquired through occupation by European countries. Certain contemporary text writers have therefore fallen into a grave error in maintaining that territories which have this character in America can, in spite of this doctrine, be so acquired by European countries.[71]

[71] *See* Salomon: "L'Occupation des Territoires Sans Maître" (Paris, 1889), No. 93. *Cf.* Jeze: "Étude Théorique et Pratique sur l'Occupation" (Paris, 1896), pages 161–165.

It does not come within the limits of this study to determine the meaning that should be ascribed to the phrase "American continent" in that which relates to the question of occupation: *i. e.*, whether it applies only to the great continental mass or includes the adjacent archipelagos, the islands situated at a great distance from the coast but within the American zone, and the polar regions. The eminent geographer, Réclus, treating incidentally of this question, considers the American continent as consisting not only of the great mass of territory with the adjacent archipelagos and islands, but also the islands situated at a distance of less than one thousand kilometres from this group (Réclus: "Nouvelle Géographie Universelle," Paris, 1893, Book XVIII, page 695, and Book XIX, page 786). Happily this question has not arisen with respect to the islands and archipelagos, since the nearest states have annexed them (*e. g.*, the Galápagos Islands by Ecuador; the Lobos Islands by Peru; the Juan Fernandez Islands by Chile, etc.). As to the controversy between the United States and Haiti as to Navassa Island, *see* Moore, *op. cit.*, Vol. I, Chap. 81, pages 266–267. Regarding the notion of "American continent" which was formed by Spain, it is useful to bear in mind that, when France occupied the Falkland Islands in 1764, the Spanish government claimed that they were subject to its sovereignty because a part of South America. Westlake characterizes this pretension as extravagant ("Études sur les Principes du Droit International,"

This doctrine of occupation has exercised considerable influence over several modern writers of International Law, who, in generalizing it, maintain that it should be a recognized principle that there are no vacant territories in continents inhabited by civilized nations even when these lands have not been occupied.[72]

On the other hand, the value of the occupation of territory of the character of *res nullius* in the New World has been almost always a matter for discussion in the conferences over the determination of boundary lines, as was particularly the case in the Anglo-Venezuelan controversy already cited.[73]

Turning again to the policy of "hegemony," although it has not established such incontestable principles of International Law as those comprised in the Monroe Doctrine and the extensions of it which have been accepted by the whole of America, still it gives rise to problems *sui generis* to which we have adverted and which are of great importance.

CHAPTER THIRD

I

In the last third of the nineteenth century, in which the third period of the history we are outlining commences, the political map of Latin America undergoes considerable modifications. Cuba and Panama establish themselves as independent states, the first by emancipation and the second by secession. Brazil changes its monarchial form of government for the republican, and is thereby enabled to come into more intimate contact with the other republics of the New World. Furthermore, the political institutions of nearly all the states have become more firmly established, and in some of them the civil wars have ceased. The most important

French translation of Nys, 1895, page 185). Not long ago the government of Spain, in its arbitral award of June 30, 1865, in the controversy between Venezuela and Holland, as to the Aves Islands, declared that they belonged to Venezuela on the grounds that Spain had formerly considered this island as a part of its dominions, although it had never actually occupied it.

[72] Ficre: "Il Diritto Internazionale Codificato," art. 541.

[73] *See*, on this point, Moulin: "L'Affaire du Territoire de l'Acre et la Colonisation interne" in "La Révue Générale de Droit International Public" (1904), Vol. XI, pages 181 *et seq.*

boundary-questions are also settled in this period and even those left pending are nearing a peaceful solution.[74] Due to immigration, and to the advances made in culture, some of these countries, especially Chile, Brazil and Argentina, have attained a grade of increasing development and prosperity which places them near the level of the best constituted states of Europe.

In their relations with the Old World, the states of Latin America draw the bonds of friendship even closer than in the former period; they negotiate treaties and conventions with the states of Europe, assist at their important international Congresses and conferences, and by their acceptance of the agreements made therein, give them a world character. Their adherence to the resolutions of the First Peace Conference, in which the Permanent Tribunal of Arbitration was formed, and the representation of all of them at the Second Conference, confirm in a most decisive manner the strict solidarity which exists between the two continents.

And in this period, the principal boundary conflicts between the countries of Europe in behalf of their colonial possessions in the New World and the states of America came to an end.[75] Conflicts of other kinds have been less frequent than in the former period,

[74] Especially, that between Colombia and Venezuela, which was settled by arbitral decision of the Queen of Spain in 1891; the question of the Missions, between Brazil and Argentina, which, submitted to arbitration by the treaty of the 7th of September of 1889, was decided by President Cleveland, the 5th of February of 1895, in favor of Brazil; that between Chile and Argentina, which, submitted to arbitration by the treaty of the 17th of April of 1896, was ended by the decision of His British Majesty, the 20th of November of 1902 (in regard to this decision and a criticism thereof, *see* Alvarez: "Des Occupations des Territoires Contestés," in the "Révue Générale de Droit International Public," Vol. X, pages 674–687); also that between Bolivia and Brazil over a portion of the Acre territory, brought to an end by the treaty of Petropolis of November 17, 1903. (On this subject, *see* Moulin: "L'Affaire du Territoire d'Acre" in the "Révue Générale de Droit International Public," Vol. XI [1904], pages 150–191.)

[75] The conflict between Venezuela and Great Britain over the boundary of British Guiana, of which we have already spoken; the conflict between Brazil and France over the boundary of French Guiana, also referred to; and that between Brazil and England over the boundary of British Guiana, submitted to the King of Italy for arbitration, by the treaty of November 6, 1901. The decision was rendered June 6, 1904. (For this decision, and a critical discussion of it, *see* Lapradelle and N. Politis: "L'Arbitrage Anglo-Brésilien de 1904" in the "Révue

though some of them have not ceased to be of importance — among which should be mentioned those of England with Brazil and Nicaragua respectively, in 1895. The conflict with Brazil arose out of the attempt of England to acquire by occupation the island of Trinidad which Brazil had already occupied; and was ended, through the friendly mediation of the Portuguese Government, by England recognizing the sovereignty of Brazil over that island. The trouble with Nicaragua grew out of the imprisonment in that country of a British vice-consul; and it is worthy of mention because Nicaragua proposed by way of settlement to abandon to England the Corn Islands, a proceeding which was, as we have already seen, objected to by the United States. But the most important of all the conflicts of this period has been due to the Anglo-Italian-German coercive action which, in 1902, was exercised against Venezuela, the antecedents and consequences of which, being so recent and well known, need no detailed statement.[76]

II

The moral influence of the United States and its policies upon the entire continent, are worthy of special attention.

At this time, because of the more frequent contact of the Latin countries with the United States, the political life of the latter served them by example and experience in a much more accentuated degree than during the preceding periods. The economic and social problems that arose in that republic, and particularly those peculiar to new countries, such as those relating to immigration and the exploitation of new territories, were observed with interest by the Latin countries, as they found themselves in an analogous situation. So that, in many problems, the experience of the United States pre-

de Droit Public et de la Science Politique" [Paris, 1905], No. 2, and pages 61 *et seq.* of the Supplement [Paris, 1905].) Compare Fanchille: "Le Conflit de limites entre le Brésil et la Grande-Bretagne" in the "Révue Générale de Droit International Public," Vol. XII (1905), pages 25–142.

[76] It should be remembered, however, that the permanent Court of Arbitration of The Hague, in its decision of February 22, 1904, recognized that Germany, England, and Italy, because of having blockaded the coast of Venezuela, had the right of preference in the payment of the credits which they might establish against that country.

sented the principal if not the only practical solution to the countries of Latin America.

Aside from this moral influence, the activity of the United States in the American continent has a triple aspect.

In the first place, the enormous growth attained in this period has given rise to the most typical cases of the development of the Monroe Doctrine and of the principle of hegemony, as can be easily seen by examining the outline we have traced at the end of the preceding period. We may add here, regarding the new states of Cuba and Panama, that not only has the United States participated directly in their making, but has frequently interfered to an equal extent in their interior political life, because of the civil wars with which those states have been affiicted. And those countries recognize that influence. Thus, article 3 of the Appendix to the Constitution of Cuba recognizes in the government of the United States the right to interfere in the country not only to defend its independence but also to maintain public order; and article 136 of the Constitution of Panama confers upon the same government authorization to interfere in Panama for the purpose of re-establishing order, in the event that the United States should by treaty assume the obligation of guaranteeing the independence and sovereignty of the newly born republic. In this way there is established for the first time in America, the problem of the possibility of completely independent and sovereign States being obliged, because of their inexperience in self-government, to place themselves directly under a kind of political tutelage of the great republic.[77]

Simultaneously with that of hegemony, the United States developed another policy, apparently contradictory but in reality in har-

[77] This system is worthy of attention, as it is without precedent and is, in our opinion, a welcome innovation as compared with the protectorates exercised by the nations of Europe. By this system, the state over which the guardianship is exercised preserves its qualities of independent and sovereign state; but, in case of grave disturbance of the internal political order, and under certain conditions in foreign relations, the United States intervenes directly in the first case, and limits the exterior sovereignty in the second. This almost tutelar system, which does not, like the protectorate, offend the dignity and national spirit, will gradually disappear in proportion as the progress of the new states renders it unnecessary.

mony with it. This country has realized that the continental solidarity of America should not be confined to the defense of the independence and integrity of the new states as against Europe, but should also extend to the broadening and strengthening of the bonds which naturally exist between all the countries of the New World by virtue of their similarity in interests and problems resulting from their situation in the same continent, a continent different in its conditions from that of Europe.[78]

For the treatment of these special interests and problems, that is to say, for the widening of the field of American continental solidarity, the United States has reunited and continues reuniting all the countries of the New World in International Conferences. It will be useful to trace, briefly, the proceedings of these conferences in order to see up to what point they have attained the primordial object which was sought by means of them, or other objects entirely different.

III

In 1881, the Secretary of State, Mr. Blaine, alarmed at the increasing strength of commercial intercourse of the Latin states with Europe, and at the same time convinced of the advisability of reacting against the policy of isolation which had existed up to that time between his country and Latin America, saw fit to invite those countries to a Pan-American Conference. This Conference was to be held in Washington in 1882, and its object was to adopt means for preventing wars among the American states. The meeting had to be indefinitely postponed because of the War of the Pacific. However, the Government of the United States persisted in the project initiated by Mr. Blaine. By the law of June 7, 1884, an investigating commission was formed, for the purpose of finding out

[78] This policy should not be confused with the efforts made by the United States to increase its commerce in Latin America, for these efforts are characteristic of all countries. There is undoubtedly, however, an intimate relation between the two policies of the United States. Mr. Rowe, in his article on "The Danger of National Isolation," published in *The North American Review*, June, 1907, pages 420–425, has clearly set forth the obstacles still in the way of a satisfactory commercial approximation between the United States and the Latin-American countries.

the best means of fostering the international and commercial relations of the United States with the rest of America. The commissioners were to find out if the Latin-American governments were disposed to enter into treaties of commerce with the United States and to meet with it in a conference where matters of common interest to all America should be discussed. The result of their investigation was entirely favorable to both ideas.

The 24th of May, 1888, the Congress of the United States passed a law authorizing the President to invite the American states to a conference which should be held in Washington the following year. The subjects to be considered in the conference, as set forth in this law, were many and of transcendent importance. Among others were the following relative to the states of America: the formation of a customs union; the establishment of regular and frequent communications between the ports of the different countries; a uniform system of customs duties; the adoption of a uniform system of weights and measures and of a common silver currency to be issued by each government; legislation regarding sanitation and regarding copyrights; and finally, a plan for the arbitration of all questions that might arise between those states.

The idea of the calling of a Pan-American Conference was diversely appreciated in America;[79] but in Europe the announcement caused a sensation. Opinion was unanimous in the belief that the United States sought by this means to dominate in the New Continent and that the conference was the first step towards that domination.[80] The states of Latin America, understanding the importance that the projected reunion had for them, accepted the invitation and sent representatives, with the exception of Santo Domingo. By a special law of the United States, after the opening of the Conference, Hawaii was invited to participate therein, and sent a delegate.

The assembly opened its sessions the 2nd of October of 1889,

[79] *See* a methodical resumen of the opinions of the press of the United States, in A. Prince: "Le Congrès des Trois Amériques" (Paris, 1891), pages 12–34.

[80] A. Prince, *op. cit.*, pages 45–68; also Pradier-Fodéré: "Amérique Espagnole," in the "Révue de Droit International et de Législation Comparée," Vol. XX (1888), page 515.

and discussed in detail nearly all the subjects on the programme. The characteristic of this assembly is that instead of subscribing conventions it voted recommendations. These recommendations were of three classes: those of continental interest which aimed to draw closer the bonds naturally existing between the states of America because of their situation on the same continent, and to settle uniformly, as far as possible, the principal international problems common to all of them and derived from the very fact of their being so situated (Pan-Americanism); others of interest to only the states of Latin America (Latin-Americanism) and tending to prevent certain abuses of the European countries in their relations with those states; and the third tending to procure agreements between all the states of America on matters of universal interest, but on which a universal or world agreement was not yet possible.

In the first category belong those relating to the conclusion of treaties of commercial reciprocity; the routes of communication between the American states by way of the Pacific, the Atlantic or the Gulf of Mexico and the Caribbean Sea; the navigation of American international rivers; the construction of a Pan-American railroad; the establishment of an American International Bank; the adoption of a common silver currency for all the nations of America; the establishment of a Commercial Office of the American Republics; and finally, the prevention of conquests and grants of territory in America.

The second category comprises recommendations tending to correct the abuse of diplomacy for the purpose of pressing foreign claims.

The third comprises the adoption of the metric decimal system; the convenience of a common nomenclature of merchandise and uniform customs regulations as to the valuation and classification thereof, port rights, consular rights, sanitary regulations, extradition, arbitration, and, above all, the questions of private International Law discussed in the Latin-American Congress of Montevideo in 1889.

It is not our present object to study in detail all these separate recommendations and the principles from which they were derived. It is, however, well for us to call attention to the most important.

The question of arbitration, which has so often aroused the enthusiasm of the Latin states of America, was the one most fully discussed in the congress; and the final resolution reached was that the governments represented in the congress should be urged to conclude a uniform treaty in conformity with a project which was set forth under date of April 17, 1890. In this project it is stated that the republics of America adopt arbitration "as a principle of American International Law for the solution of difficulties, disputes or contests between two or more of them" (article 1); this arbitration to be obligatory, permanent and general, that is to say, for all manner of controversies, excepting only "those questions which, in the exclusive judgment of one of the nations interested in the contest, compromise the independence of that nation; in such case, the arbitration will be voluntary on the part of that nation, but will be obligatory for the other party" (articles 2 to 5). This exception, as is seen, destroys the rule. Under arbitration remain included the questions pending at the time of the Conference (article 5). The treaty may be adhered to freely by all the nations that so desire (article 19). This project on arbitration, in its scope, had no precedent in the diplomatic history of the world, and was adopted, not without certain opposition to some of its articles on the part of various countries, especially Mexico. The delegation of Chile, because it considered that the project was Utopian and that it directly affected pending questions of the War of the Pacific in which Chile had a special interest, opposed it vigorously, with an extensive declaration of motives for so doing, maintaining that while arbitration was commendable for stipulated cases, situations and countries, it was not commendable in its general and obligatory character in the actual state of international society. For these reasons that delegation, representatives of a country which, far from being averse to arbitration, on the contrary was perhaps one of those that had agreed to and practiced it most in America, refrained from taking part in the discussion and adoption of the project referred to.

In addition to approving this project on arbitration, the conference expressed the hope that the controversies between European

and American nations might be decided by the same means, recommending to the governments represented in the Conference that they communicate this resolution to all friendly powers.[81]

In the resolution adopted regarding diplomatic claims, it is established that foreigners have the same rights civilly as the citizens of the nation, and that they can exercise those rights in the same manner as the citizens. It is declared, furthermore, that the American nations have not, nor do they recognize, in favor of foreigners any other obligations and responsibilities than those which by their laws they have towards their own citizens. The delegation of the United States of North America refrained from voting on this declaration.

On the subject of conquests, the adoption of the following declarations was recommended:

1. The principle of conquest is eliminated from American Public Law, for as long as the treaty on arbitration remains in force.
2. The grants of territory which may be made during the time that the treaty on arbitration subsists, shall be null if made under menace of war or because of force of arms.
3. The nation making such grants shall have the right to demand that their validity be decided by arbitration.
4. The renunciation of the right to demand arbitration, if made under the conditions set forth in article 2, shall be without value or efficacy.

With only one exception all the delegations, including that of the United States, voted in favor of this resolution. The delegation of Chile, however, refrained from voting because that resolution, like the project of arbitration, directly affected pending territorial questions.

The immediate result of this First Conference was the signing in Washington, the 28th of April of 1890, near the close of the sessions, of a treaty of arbitration on the model approved by the conference on the 17th of the same month. This treaty was subscribed to by one-half of the countries represented in the assembly: United States, Haiti, Guatemala, El Salvador, Honduras, Nicaragua, Ecuador, Bolivia, and Brazil, but was not ratified by them.

[81] The governments of Europe to which this desire was communicated by the United States did not attach great importance to the invitation.

IV

The idea of the Pan-American Conferences was among those destined to grow gradually as time passed and as the states of America entered freely on the way of progress; but it was necessary that those conferences should be convened on other bases.

Blaine, the originator of the conferences and the preparer of the first of them, ignoring their natural object and scope, committed a fatal error in aiming, through that first assembly, to tie up hurriedly and immediately the interests, and especially the economic interests, of the United States with the rest of America. This error was the more inexcusable in as much as there did not exist between those two groups of countries the mutual understanding, morally and intellectually, which is indispensable to the existence of an effective union of this kind.

Profiting by the experience gained in this first conference, the programmes of the second and third, which took place in 1901–1902 and 1906, in Mexico and in Rio Janeiro respectively, excluded those projects which had been found Utopian in character or difficult of realization, thus limiting the discussions to subjects of a more practical nature.

In the Second Conference, as in the first, arbitration was the theme that most occupied the countries therein represented, and this was due, as formerly, not only to the love of the principle itself, but also to the interest that certain countries had in bringing moral pressure to bear on Chile to secure the settlement by arbitration of the question pending between that country and Peru. On this occasion, Chile was again the champion to oppose obligatory and general arbitration and to argue in favor of voluntary arbitration such as had been approved a short time before by the First Hague Conference. The United States having declared itself in favor of the same idea, the states of America agreed unanimously to concur in the resolutions of the Hague Conference on this subject, thereby giving them the character of world-resolutions.[82]

[82] While adhering to the conventions of the Hague Conference, and consequently, to the "voluntary arbitration" established in one of those conventions, the delegates of nine countries — Argentina, Bolivia, Santo Domingo, Guatemala,

In view of the disproportionate importance that special interests had given to the question of arbitration in the two Pan-American Conferences, it was agreed to eliminate this topic from the programme of the Third Conference, in order to give adherence to whatever might be resolved in that respect by the Second Hague Conference to which all the states of America were invited.

In the Second and Third Conferences, conventions were subscribed and resolutions adopted which are of positive importance in the international politics of America. The conventions subscribed, either in both conferences or in one or other of them, were the following: codification of International Law; claims for injuries and pecuniary damages; rights of foreigners; condition of naturalized citizens who resume their residence in the country of their origin; adhesion to the conventions of the First Hague Conference; exercise of the liberal professions; protection of literary and artistic works; patents of invention, drawing and industrial models, trade-marks and brands; extradition and protection against anarchy; and interchange of publications.

The recommendations or resolutions treated of the following questions: Pan-American railroad; establishment of a Pan-American bank; public debts; the calling of a customs house congress; publication of the statistics of the respective countries; preparation by each country of a detailed study regarding its monetary system; measures for facilitating international commerce; reorganization of the International Office of the American Republics; creation in that office of a special section for commerce, customs and commercial statistics, and of a special service destined to facilitate the improvement of the natural resources and the means of communication in the various

El Salvador, Mexico, Paraguay, Peru, and Uruguay — subscribed, under date of January 29, 1902, that is to say, three days before the close of the First Conference, to a general treaty of obligatory arbitration, in which the parties bound themselves to settle in that manner all controversies existing or that might arise between them, provided, however, that said controversies affect, in the exclusive judgment of one of the interested nations, neither the independence nor the honor of the nation (art. 1). It is agreed, further, to submit to the Permanent Court of Arbitration of The Hague all the controversies to which the treaty refers, unless one of the parties prefer that a special jurisdiction be organized (art. 3).

countries; commercial relations; sanitary police; the calling of a congress for the study of the production and consumption of coffee; creation of an international archealogical commission; creation of special sections, dependent on the departments of foreign affairs of the various countries, to facilitate the realization of the agreements and resolutions of the Pan-American Conferences; and, future international conferences.

Of the conventions approved in this Conference, the one most worthy of note is that aiming at the codification of International Public and Private Law, because once carried out, it will be a great step toward the uniformity of international relations in America, while at the same time having a decisive influence in International Law. Another great step in the direction of drawing closer the relations between the states of the New World, is the perfecting and widening of the attributes of the International Office of American Republics created by the First Conference. This institution already does splendid work, furnishing to all these republics *data* required regarding any one of them.

The conventions subscribed in the Conferences of Mexico and Rio Janeiro, have already been ratified by a number of states; and the measures adopted recently by the Third Conference to obtain that ratification [83] give grounds for the hope that they may be accepted in the near future by all the nations of America.

V

It is not within the limits of this present article to examine or set forth the principles contained in all the conventions and resolutions adopted in the Second and Third Pan-American Conferences.

Certainly, however, we should note that in the conventions of a universal character, in which a general or world agreement is not yet possible (such as, literary and artistic copyrights, trade-marks and brands, extradition, and some other questions of International Pri-

[83] Above all, the resolution recommending the creation of special sections dependent on the departments of foreign affairs of the respective governments, which should have for their object, among others, to urge the approbation of the conventions approved in those assemblies.

vate Law), the articles therein have not been founded on idealistic principles, but have been framed rather in accordance with the principles and practices accepted by European states in similar conventions.

But the conventions approved by the First Hague Conference are those that exerted the greatest influence upon the Pan-American assemblies. In the Conference of Mexico, it was agreed to recognize the principles established in the three conventions of that Hague Conference dated July 29, 1899, "as part of the American International Public Law." At the same time, the governments of the United States and Mexico were delegated to treat with the other powers signatory to the "Convention for the peaceful settlement of international conflicts" to permit the adhesion to that convention of any non-signatory American nations that might so desire.

In so far as concerns the subjects of Pan-American character arranged in the Second and Third Conferences, they were settled, as must inevitably have been the case, in conformity to the necessities and special conditions of the countries of America. And the settlement of these questions is of considerable importance, as it will not only tend to facilitate the relations between all these countries, but will also show to the countries of Europe the extent to which the New Continent has problems distinctively its own.

And as for the resolutions on subjects of Latin-American character, they have had for an object the prevention of certain abuses that the European countries commit against the Latin republics of this Continent.

In this connection, the Second Conference, on the proposal of the delegation of Chile, approved a project of a convention in which it was declared that foreigners have the same civil rights as the citizens of the nation, and that the states have no other responsibility towards foreigners than that which they have, according to their constitution and laws, towards their own citizens. It was further stated that when a foreigner has cause for complaint against a state, he should establish that claim before the proper tribunal of that same state, and should not be allowed to make claim through diplomatic channel except in extreme cases of a denial of justice or unwarranted delay

or open violation of the principles of International Law. The United States refrained from subscribing to this convention.

The Argentine Republic, for its part, because of the coercive Anglo-Italian-German action against Venezuela in 1902, manifested in a famous communication of its Minister of Foreign Affairs to its Minister Plenipotentiary in Washington, its desire for the recognition of the principle that a "public debt does not justify armed intervention, nor even the actual occupation of the territory of American nations by a European power." This point was included in the programme of the Third Pan-American Conference which recommended to the Governments represented to consider whether the Second Peace Conference should be invited to examine this case of forcible collection of a public debt and, in general, measures tending to lessen conflicts of exclusively pecuniary origin between the nations.

In the Hague Conference that doctrine caused a sensation because it was believed that the Latin-American States sought by this means to evade the payment of their financial obligations. The convention subscribed to in that assembly by all the powers establishes, in its first article:

> The contracting powers agree not to have recourse to armed force for the recovery of contract debts, claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is, however, only applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any "compromis" from being agreed on, or, after the arbitration, fails to submit to the award.

In our opinion, the Drago Doctrine has by no means the American interest that has been ascribed to it, since the failure of payment of financial obligations is not a characteristic of the states of this Continent.

That doctrine is, besides, either superfluous or defective, according to the object in view. It is superfluous if it seeks (as is stated in the note of the Argentine Government, in 1902, and as the author of the doctrine has himself declared [84]) to prevent the European

[84] Drago: "Les Emprunts d'État et leurs Rapports avec la Politique Internationale" in the "Révue Générale de Droit International Public," Vol. XIV, pages 270–272.

states from gaining possession of any portion of the American continent, because the Monroe Doctrine had already established that point. And if its object was to prevent the European states from bringing pressure to bear upon the Latin-American states to force them to submit to their demands before said demands have been declared justified by arbitral award (which of a certainty would be of American interest), then the doctrine is defective because it has not adopted this general formula, but on the contrary has referred only to a special case.[85]

[85] For the reason already mentioned, we can not accept the opinion sustained by a distinguished European publicist that the Drago Doctrine is the indispensable complement of the Monroe Doctrine because it aims at the financial independence of the states of the New World and consequently the refusal to recognize the former would be equivalent to a refusal to recognize the latter. (*See* Moulin: "La Doctrine de Drago" in the "Révue Générale de Droit International Public," Vol. XIV, pages 417 *et seq.*)

Early in 1906 we declared our opinion that the Drago Doctrine, examined from the purely doctrinal standpoint, was too absolute. We justified our objection in the following terms: "Intervention, armed or otherwise, against a *bona fide* state, is inadmissible when it has for sole object to exact payment of a public debt, or the fulfillment of any compromise whatsoever, much more so when it aims to compel the State to recognize obligations not in accordance with International Law. * * * Against such States, claims should be made always in accordance with the procedure established by International Law. Furthermore, in dealing with those that act in bad faith, or that through their own fault find themselves unable to satisfy their obligations, or that cause or permit to be caused injuries to foreigners, compulsory measures are admissible, but only after all diplomatic means have been exhausted. A State may be said to act in bad faith only when, without plausible excuse, it refuses to pay debts liquidated or places obstacles in the way of the liquidation of a debt arising from a convention, from arbitral award rightfully pronounced or from the principles of International Law universally recognized."

In regard to the antecedents of the Drago Doctrine and the criticisms and opinions thereon, *see* the work "La Republica Argentina i el Caso de Venezuela," by Luis M. Drago (Buenos Aires, 1903), and the Appendix to this work published in 1906. Compare Basdevant: "L'Action Coercitive Anglo-Germano-Italienne contre le Venezuela" in the "Révue Générale de Droit International Public," Vol. XI, pages 362–458. The writings in this last period have been most numerous. That question has been the subject of an important discussion in the annual meeting of the "American Society of International Law" of 1907 (Proceedings of the American Society of International Law at its First Annual Meeting, pages 100–149).

VI

Although the conventions approved in the Pan-American Conferences have not yet been ratified by all the states of America, those conferences have brought about the results which assemblies of their character are destined to produce. In short, these conferences have led to results which are no less far-reaching, and are not without great importance. In the first place, they make known the international political psychology of the states of America, that is to say, the problems which most particularly concern those states and the means they judge best suited for their solution; and also, to what extent those states are able to agree, whether in matters of a world character or matters that affect only their immediate interests. Furthermore, these conferences have contributed powerfully to the development and foundation on correct principles of an *American consciousness,* a consciousness which is one of the characteristics of the political life of the states of the New World. And finally, the resolutions subscribed to in those assemblies are rules of International Law in the making, for they prepare and accentuate public opinion on the subject of which they treat, and not only acquire a considerable moral authority, particularly when confirmed by several conferences, but also serve as models to be used by the states for their future pacts.[86] Thus these resolutions, because of the uniformity they establish in opinions, practices, and tendencies, tend to facilitate the codification of International Law. Once ratified by the states of America, the conventions approved in those assemblies will be precepts for which the public opinion has been prepared, and which will exercise, because of the number of states that observe them, a considerable influence in the progress of the Law of Nations.

VII

The contemporary international life of the Latin states of America is characterized by an ardent desire for peace, and by the develop-

[86] The Latin-American states have concluded, since those conferences, numerous conventions among themselves on the subjects treated therein, which are modeled very closely after the conventions of those conferences. In this there has been a real abuse, for the conventions subscribed to in the conferences have for their object to unite all the states in one single convention.

ment of an *American consciousness.* Their aspiration towards peace is manifested by the clause they insert in the treaties of commerce that they conclude imposing mutual obligations upon the parties by the numerous treaties of general arbitration which nearly all of them have recently concluded, and likewise by their submitting to this peaceful method of settlement all the conflicts that have arisen and that have been capable of being resolved in this manner. [The first treaties of general arbitration were celebrated in 1872 by the Central-American Republics among themselves.[87]]

The Argentine Republic is the state that has concluded the greatest number of treaties of general obligatory arbitration. On the 23d of July, 1898, it celebrated the first of that nature, and of such scope that it caused a sensation in the political world as it established no exception whatever to the conflicts which should be decided by that means. It has not been ratified. Since that date, the same nation has concluded various treaties of a like nature though not so ample as that first one.[88]

Inspired by that same desire for peace, Chile and the Argentine Republic concluded, on May 28, 1902, a pact on the limitation of naval armaments[89] (completed by the Additional Acts of June 24 and July 10 of the same year and by the protocol of January 2, 1903), which aimed to render effective a prudent equality. That pact, because of its aim and scope, and also because of its having been entered into when the two countries were at the point of breaking

[87] On December 20, 1907, the five republics signed in Washington a general treaty of peace and friendship, by virtue of which they bound themselves to decide all disagreements that might arise between them, by means of a "Central American Court of Justice" established by convention of that same date. They likewise subscribed to a treaty of extradition and another on the establishment of a Central American International Office. (The texts are given in the Supplement of this JOURNAL, Vol. 2, pages 219–265.)

[88] With Uruguay, June 8, 1899, and additional December 21, 1901; with Paraguay, November 6, 1899, and additional January 15, 1902; with Bolivia, February 3, 1902; with Chile, May 28, 1902; and explanatory act of July 10, 1902; with Brazil, September 17, 1905; and with Italy, October 12, 1907; these last two not yet ratified.

[89] *See* Supplement, Vol. 1, page 294; and for the protocol of January 2, 1903, *see idem*, Vol. 1, page 297.

off diplomatic relations with each other, is famous in the history of International Law.[90]

But this aspiration of the American states towards peace is not by any means a "pacifismo a outrance." They realize that because of their geographical situation and their economic conditions, they may possibly be involved in grave conflicts with the countries of the east and west. Therefore, they seek to increase their army and navy, and consider themselves obliged to adopt, although with less intensity than the European states, the policy of armed peace.

Furthermore, in America, united by the gradually increasing contact between the states and by the work of the Pan-American Conferences, the lack of such antagonisms as exist among the countries of Europe (though there have been some differences between these states) has caused the foundation on a new basis of the consciousness (which, since the time of their emancipation, all these states have had) of the existence in America of a double solidarity: the continental and the Latin-American. Until the last third of the nineteenth century, continental solidarity referred, as we have seen, only to points contained in the Monroe Doctrine. Latin-American solidarity, based on the fact of the common origin of all the Latin states of America, sought the formation among those states of a complete or at least a partial confederation which would draw closer the bonds created by that common origin. At the present day, the field of continental solidarity (Pan-Americanism) has widened, embracing all the problems of the states of America which arise from the fact of their situation on a continent distinct from that of Europe. The Latin-American solidarity (Latin-Americanism), in turn, has been restricted, losing its Utopian character and confining itself to those problems derived from or connected with the common origin of the constituent countries. Latin-Americanism thus reduced has had the two tangible manifestations we have already seen, in the international conferences; but, in its scientific aspect, it has been manifested in the holding of three Scientific Congresses, in 1898, 1901, and 1905,

[90] Those same sentiments, which both countries had before exhibited, inspired a treaty on boundaries, of July 23, 1881, which in article 5 declares the Magellan Straits forever neutral. *See* Supplement to this issue of the JOURNAL, p. 121.

in Buenos Aires, Montevideo and Rio Janeiro respectively. Those assemblies, while treating of various affairs of special interest to those states,[91] have also served to bring into contact their intellectual elements and scientific centres.

In so far as concerns Pan-Americanism, the United States has realized that, in order that it should have a solid foundation, the holding of international conferences is not enough, but that it is necessary to destroy the distrust that the Latin states have of its policy in America, a distrust which is, furthermore, an imminent danger not only for the economic interests of that republic, but also for its foreign policy, which would be that of isolation on the continent.

Therefore, in obedience to the conviction that the exercise of the principle of hegemony is one of the causes of that distrust, the United States desires, or at least shows itself not unwilling, that the better constituted Latin states should share with it, in proportion to their strength, the exercise of that hegemony in the matter of the safeguarding of the interests of the American continent. The hegemony would thus be modeled after the European "balance of power" and would be extremely beneficial to America.[92]

Furthermore, understanding that the bonds of friendship and of intellectual intercourse are the precursors and at the same time the most solid bases of good relations, it has endeavored to establish

[91] The most important common problem is that relative to the unification of Civil Law. This problem does not present great difficulties, taking into consideration the sources from which the laws of those countries have been drawn.

In the Third Scientific Congress we had occasion to consider this subject.

We should mention here, also, the doctrine which a distinguished Ecuadorian Plenipotentiary, Doctor Tobar, has formulated for the purpose of preventing civil wars in the Latin countries of America. In his opinion, the best means of securing this object would be that those countries should all bind themselves not to recognize governments *de facto* born of a revolution. This idea of preventing civil wars, we have seen, has been one of the considerations of the Latin states of America in the congresses which they held in the first period of their history; and the resolutions adopted in this respect in some of those congresses appear to us more acceptable, as they are less absolute, than those of Doctor Tobar.

[92] This American cooperation would replace advantageously the doctrine of "international police," according to which it would devolve upon the United States to see that the Latin states of America comply promptly with their obligations toward the states of Europe.

those bonds with the Latin countries of America. To this object was due the visit which the Secretary of State, Mr. Root, made to the principal republics of the New World at the time of the Third Pan-American Conference. His visit has been followed by others of distinguished North American politicians and scholars who have placed the universities of their country in constant communication with those of Latin America.

Although there are still obstacles in the way of the full development of Pan-Americanism, it is gaining ground rapidly, especially with the directing and intellectual class in the New World, and there is every ground for hope that within a very short time the term America may be recognized not merely as a geographical expression, but as the symbol of a New Continent of which the constituent states, free from antagonisms, are closely bound together, by interests of every kind.

We feel sure that the First Pan-American Scientific Congress, to be held at the end of the present year [1908] in Santiago, Chile, will also contribute powerfully to the tightening of those bonds of mutual understanding. Furthermore, in view of the object of that Congress, which is exclusively the study of continental problems in all branches of activity, it will not only manifest and develop an *American mentality,* but will also help to make more fruitful the labor of future Pan-American Conferences.

Pan-Americanism counterbalances Pan-Saxonism, Pan-Latinism, and Spanish-Americanism, in the sense that both the United States and the Latin states of America feel themselves more closely bound to each other than to the other countries of their same respective origins.[93]

[93] Pan-Americanism counterbalances particularly Spanish-Americanism, though that does not mean to say that there exists between the two any irreconcilable opposition.

Spain has sought for some time, for political and economic reasons, to create a close unity of interest between itself, Portugal, and the countries of Latin America. In fact, there has been formed in Madrid a powerful scientific society aiming at that object. In the same city, under the auspices of the Spanish government, two international congresses have been held which have sought the same ends. In 1892, in connection with the celebration of the Fourth Centennial of America, a Spanish-American Juridical Congress was held, in which

We will observe, finally, that two extreme errors are to be guarded against in the concept of Pan-Americanism and Pan-Latinism. In the first place, not only are these two ideas not antagonistic to each other, but they do not even oppose in any way the solidarity and increasing growth of common interests existing between the states of the New World and those of the Old. At the other extreme, neither do those concepts imply the existence of any absolute solidarity between the countries of America, especially from the standpoint of foreign policy, and, above all, for the support of a state that causes international complications because of its improper proceedings. Such a view, besides being without any plausible foundation, would be extremely detrimental to the good fame and prestige of the states of the New World.

The foundation and object of both solidarities is much more praiseworthy: to strengthen the relations naturally existing between the states of all America or between the Latin group of states, and due, in both cases, to the situation of those countries in the American continent; to study the common problems arising out of that situation, and to endeavor to solve them uniformly in order to pursue a policy in conformity with their common interests.

CHAPTER FOURTH

I

In the preceding chapter we have seen in what way the separation of Latin America from the mother country worked changes in the international community: it not only added new states with the similar constitutional characteristics to those already existing, but had a marked influence upon the rules governing these states because of the peculiar phenomena attending the development of these new

various important matters were discussed, especially arbitration. In 1900, a "Spanish-American Social and Economic Congress" was held, the object of which, plainly stated, was to draw closer the bonds of every kind, and especially the economic, between the Spanish-American peoples. That assembly followed very closely the programme of the First Pan-American Conference, even going so far as to propose the establishment of a Spanish-American Bank. (*See* "Congreso Social y Economico Hispano-Americano," two volumes, Madrid, 1902.)

members of the community.[94] Now let us see briefly the nature of this influence.

It has consisted: in the application, to international relations, of principles opposed to those obtaining at that time in Europe, and which existed only in the theory of philosophers and writers or in the ideas of the French Revolution; in the generalization of principles which were barely recognized at that time in Europe, appearing in conventions entered into by one or two European states; in the development of problems *sui generis* or problems distinctively American; in the uniform regulation of matters of especial interest to these Latin-American states; and, finally, in the uniform regulation of questions of universal interest but on which a universal agreement is not yet possible.

In regard to the first category, we have seen that the Latin-American states, at the beginning of the nineteenth century, in the same way as the United States at the end of the eighteenth century proclaimed and sustained by arms their right to independence from the mother country and to treatment not as rebels, but as belligerents. They proclaimed, furthermore, with the United States in the Monroe Doctrine, the liberty of all the states of America as a whole; that is to say, that they should not be subject to the interference of the European states; and at the same time, that the New World should not be considered open to colonization because the whole of it (even the regions unexplored and consequently, according to the principles then dominant, *nullius*) was already subject to the sovereignty of independent states.[95]

The equality of all the states of America was also recognized, in the sense that there should exist among them no political pre-eminence.

[94] There has not been sufficient study given to the influence exerted by the discovery and conquest of America on the community of nations, especially in the development of the Law of Nations. In regard to this last, *see* Fernandez Prida: "Influencia del Descubrimiento y Conquista de America en el Derecho Internacional" in his "Estudios de Derecho Internacional," Madrid, 1901, pages 141–213.

[95] Not only do no territories "*nullius*" exist on the American continent, but further, and in consequence thereof, no international value is given to the pos-

All these principles of independence, liberty, and equality of the American states, happily synthesized in the Monroe Doctrine of which the United States as the most powerful of those countries constituted itself the defender, were proclaimed at a time when attempts were being made in Europe against their liberty and independence by means of interventions, and when the equality of the states was denied by the system of the "balance of power" which was shared in by only the great powers.

From the time of their proclamation, those principles have been the basis of the international relations of the states of the New World, the basis, consequently, of what may be called "American" International Law. Those states, furthermore, contributed greatly towards the incorporation of those principles, later on, in "General" International Law.

The Latin States of America also gave an example of international fraternity by joining together in conferences for the adoption of measures best calculated to maintain peace among them and for the development of their reciprocal relations. In those congresses they proclaimed two new principles, which were also opposed to those that up to that time had obtained in the general community of nations, and of which the United States, as in the case of the Monroe Doctrine, constituted itself the defender: the purpose of the enunciation of these principles was to prevent the states of Europe from acquiring by any means whatsoever, even with the acquiescence of the American countries, any portion of the territory of these countries, or these latter countries from placing themselves under the protectorate of a foreign state; and, secondly, to prevent the occupation, more or less permanent, of any portion of the territory of an American country by any state of Europe, even by title of war.

session of certain regions held since time immemorial by native tribes not recognizing the sovereignty of the country within whose limits they find themselves. Two important consequences follow therefrom: that the occupation of those regions by the natives is a matter of internal public law of each country and not of International Law; and second, that the governments have, in certain cases, an international responsibility for the acts of the natives within their boundaries, even though those natives do not recognize the sovereignty of the state.

These principles, not yet recognized in "General" International Law, lie at the basis of the structure of "American" International Law.

There has also been a desire on the part of some to proclaim as a principle of "American" International Law the territorial integrity of the states of the New World exactly as they were when they freed themselves from Spanish dominion — nullifying, in consequence, territorial secessions and annexations. But this has been no more than a noble ideal, and has not been given any practical application in the diplomatic history of America.

The second contribution of the Latin states of America to the development of International Law, has been to proclaim and generalize certain international principles or rules which had only barely made their appearance in Europe in the agreements of some few states, such as, the freedom of the seas, commercial liberty, the abolition of the slave-trade; the declaration that the states should adopt adequate means tending to prevent the organization in their respective territories of expeditions aiming at the disturbance of the public order of another state; with respect to the rights of the individual in his person, beliefs, and property; equality between citizens and foreigners in the acquiring and enjoyment of civil rights; no extradition for political offenses; the fixing of a certain time to elapse and formalities to be gone through prior to the declaration of war; the restriction and humanizing of war by land and sea, and especially the elimination from the international concept all conflicts not between states; the prohibition of the sacking of the towns and strongholds of the enemy even when taken by assault; facilities for neutral commerce; abolition of privateering; declaration that the neutral flag covers enemy's goods except contraband of war, and that blockades are not binding unless effective. These last three principles proclaimed in America as far back as 1848 were not recognized by all the states of Europe until the Treaty of Paris of 1856.[96]

[96] Consequently, some American countries, in replying to the invitation to adhere to the resolutions of the Congress of Paris of 1856, stated that they had no difficulty in accepting because those resolutions were already forms of their foreign policy and incorporated in conventions already celebrated by them.

But the principle which they have most extensively proclaimed and systematically practiced before its acceptance by Europe, is the employment of peaceful means to prevent or settle international conflicts. The states of Latin America not only have proclaimed the principle of arbitration in their international conferences, and stipulated it in numerous conventions and practiced it in the conflicts in which they have found themselves involved,[97] but some of them have even established it in their constitutions. In fact, some constitutions declare that arbitration shall be stipulated in treaties as the means of avoiding conflicts (e. g., Constitution of Venezuela article 120; of Santo Domingo, article 101); others provide that before resorting to war this pacific means of solution shall be tried (e. g. Constitution of Santo Domingo, article 104; and of Brazil, article 34). In the matter of arbitration, the reciprocal influence of Europe and America is also worthy of note.[98] In the Second International Pan-American Conference optional arbitration was supported on the grounds that it was the result reached by the countries of Europe on this point. And in Europe, on the other hand, the policy of the American states has been cited as an argument in favor of obligatory arbitration.

In regard to the third and fourth classes of the contribution of the Latin States of America to the development of International Law — these are to be found in the train of problems *sui generis* that have grown out of civil wars and boundary disputes, of immi-

[97] The Latin states have chosen as arbiter in their conflicts, governments of Europe, and rarely governments of America. This is due principally to the fact that they expect to find in those governments real impartiality and grounds for respecting their award. In conflicts between American and European states, only once has a Latin-American government been chosen arbiter, — in the conflict between England and the Argentine Republic occasioned by damages claimed by the former from the latter because of the closing of the port of Buenos Aires to six English merchantmen which had touched at Montevideo, which port had been declared blockaded by the Argentine government. By virtue of the stipulation in the protocol of July 15, 1864, the question was submitted for arbitration to the government of Chile, which, after hearing the *dictamen* of the Supreme Court of Justice, rendered its decision on the 1st of August, 1870.

[98] Regarding arbitration in Latin America, *see* Toro: "Notas Sobre Arbitraje Internacional en las Republicas Latino-Americanas" (Santiago de Chile, 1898); also Quesada: "Arbitration in Latin America" (Rotterdam, 1907).

gration and the attraction of European capital (which we have already had occasion to mention) the creation of situations distinctively American, among which the principal and most characteristic is the hegemony of the United States in the New World.

The fifth and sixth forms of contribution are of no less consequence than the preceding. A perusal of the conventions and resolutions subscribed to in the Pan-American Conferences will suffice to enable one to form an idea of the number and importance of those that refer exclusively to American interests, and of those that refer to matters of general interest on which a world agreement is not yet possible.

II

Not only has the contribution of Latin America to the development of International Law been of vast proportions, but the manner in which the contribution has been made has also been of the most important consequence to that same law. It has shown, in fact, most clearly that although the general community of nations possesses solidarity and recognizes the same international precepts, those precepts are not always universal, that is to say, they are not applied in all cases and in like manner on both continents. The difference between the origin and international development of the Old and New Worlds has brought about, as a necessary consequence, that there have been and are still some precepts of International Law universally recognized by the states of Europe, which, however, are not applicable to the American continent; furthermore, that there are on this continent problems *sui generis* in character, or distinctively American; and that the states of the New World have regulated by conventions subscribed to by all of them, matters of interest to them alone; and, finally, that those states have been able to settle in the same way questions of universal interest but which have not yet been thus regulated by the states of Europe.

These differences, far from destroying the universal community of nations, on the contrary strengthen it, because they place it on its proper bases in as much as they reflect the differences that exist between the constituent elements of that community. To pretend that

all the states that form the community of nations should be always governed by the same identical rules, would be equivalent to a denial of the right of groups of nations of special origin and geographical situation to develop in conformity to their nature when they are able to so develop without destroying any of the fundamental principles on which that community rests. Nor can it be said that this thesis runs counter to the general tendency of modern society in the direction of international solidarity, for this solidarity does not mean that they should always be governed by the same unvarying rules, but rather that they should all observe those rules which permit them to develop individually, each in accordance with his best interests. Nor can an objection be raised at this point on the ground that it is impossible to admit the existence of a separate International Law for each continent, one American and the other European; in truth, we have already seen that the doctrines of International Law, especially the fundamental ones, are fully accepted by both hemispheres as being the fruit of a common civilization. So the question is not as to whether two independent systems of law should be recognized but one quite different. Starting from the basis of the unity and universality of International Law, the problem is only how to correct the unconditional and absolute character of some of its doctrines.

Out of these five groups of questions which exist only in the New World spring what we term "American" International Law — though this expression may be ambiguous and has been employed many times with different meanings, many of them utterly unacceptable.[99]

[99] One of the acceptations of the term is that of "a collection of concrete cases in international questions which have occurred in America." In this sense the expression has been taken by Pradier-Fodéré: "Traité de Droit International Public Européen et Américain," and Seijas: "El Derecho Internacional Hispano-Americano Publico y Privado" (Caracas, 1884).

In this connection, some publicists of the United States have gathered together and classified methodically the international questions which interest their country and which have been the subject either of conventions, or of diplomatic negotiations, or of decisions by tribunals of justice. These works also have been referred to as American International Law: *e. g.*, Wharton: "A Digest of the International Law of the United States," and Moore: "A Digest of International Law," 8 vols. (Washington, 1906).

Not a few of the difficulties between European and American states have arisen because the fact of the existence of an "American" International Law has never been clearly proved, though it is the most important point untouched in the study of International Law.

III

As a conclusion to the present work, we believe it useful to draw an outline classifying systematically and indicating in a manner distinct from that of the previous section the principal matters included in our subject of "American" International Law.

Another meaning given to that term is in contradistinction to "European" International Law: to indicate that there is an antagonism of interests between the Old and the New Continent. In this sense, the existence of an "American" International Law provokes, and justly, warm protests on the part of the states of both hemispheres, as it is clearly absurd to hunt for and suppose antagonisms where everything should tend toward solidarity. And because of the expression having been taken in this acceptation, some members of the First and Second Pan-American Conferences denied the existence of an "American" International Law. (*See* "Conferencia Internacional Americana," official edition, Washington, 1890, Vol. II, pages 969–970.) Compare "Actas y Documentos de la Segunda Conferencia Pan-Americana," Mexico, 1902, Vol. I, pages 342–343.

A third acceptation of the term indicates by the expression "American Public Law" and even "South American Public Law" (*e. g.*, in the preamble of the treaty of April 20, 1886, between Peru and Bolivia, settlement of boundaries) the solidarity of interests existing between the states of these groups.

A fourth acceptation is in the sense of "the international rules which the states of America expressly recognize in the Pan-American Conferences and to which they give great importance." In this sense, the First Pan-American Conference recognized arbitration, and the Second Conference recognized the principles stated in the three conventions signed at the First Hague Conference as rules of "American International Law."

Finally, a fifth acceptation of the term considers as rules of "American" International Law certain principles "sui generis" which it is sought to establish as a privilege for America because of their being of vital interest to that portion of the world and which form an exception to the general precepts of the Law of Nations. A like application is made to the Drago Doctrine by its author himself. (*See*, regarding this acceptation, Drago: "Les Emprunts d'État et leurs Rapports avec la Politique Internationale" in the "Révue Générale de Droit International Public," Vol. XIV (1907), pages 271 in fine and 287. Compare Moulin: "La Doctrine de Drago" in the same Révue, Vol. XIV, pages 466 and 468.

PROBLEMS EXISTING IN EUROPE AND WITHOUT APPLICATION ON THE AMERICAN CONTINENT:

1. *The political "balance of power."*
2. *Principal manifestations of imperialism:*
   (a) colonial system;
   (b) zones of influence or *hinterland.*
3. *International condition of certain states or portions of territory:*
   (a) personal and real union;
   (b) semi-sovereign states;
   (c) protected states;
   (d) free colonies;
   (e) perpetually neutral states.
4. *International problems relative to population:* conditions of emigration.

PROBLEMS OF SPECIAL INTEREST TO THE AMERICAN CONTINENT:

. *Problems relative to the international condition of the continent:*
   (a) virtual occupation and effective occupation of the entire continent; the consequences from the international standpoint;
   (b) international effect which a movement of independence of the European colonies existing in America would have;
   (c) transfer of those colonies from one country to another;
   (d) occupation, especially by title of war, of any portion of American territory by a European country;
   (e) international situation of the islands and polar regions of antarctic America; to what extent they may be acquired by occupation or be included within the zones of influence of European or American states.
2. *Problems relative to the possible limitation of the sovereignty of the states of America:*
   (a) limitations which may exist in some of the diplomatic negotiations of the Latin-American republics, especi-

ally in regard to the submitting of their sovereignty to a European state;

(b) voluntary cession or lease of a portion of American territory to a European state;

(c) voluntary incorporation of one American state into another;

(d) voluntary secession of a state;

(e) annexations and concessions of contested territories.

3. *Problems relative to the territorial concessions which a state may make:*

(a) leases or concessions of portions of territory made to foreign states or syndicates; their results;

(b) international condition of those concessions when the conceding state delegates to the concessionary certain attributes of its sovereignty.

4. *Problems relative to the delimitation of boundaries:*

(a) delimitation of boundaries, principally between more than two countries;

(b) value of natural boundaries;

(c) *uti possidetis* of 1810; its origin, object, and scope;

(d) rights and duties of contesting states, in territory contested, during the contest;

(e) value of the concessions made by one contestant state over a zone of contested territory, which, by arbitral award or otherwise, remains in the possession of the other contestant.

5. *Problems relative to the routes of communication:*

(a) international situation of the routes of communication which may unite and those which actually do unite the two great oceans;

(b) the Pan-American Railroad;

(c) the international rivers.

6. *Problems relative to the increase of population of the states:*

(a) conditions of immigration;

(b) states, before the public law of each state, of the portions of territory peopled exclusively by colonists of the

same nationality; the influence upon international relations;

(c) likewise when the colonists are of different nationalities.

7. *Problems relative to the responsibility of the states:*

(a) responsibility which European governments impose on some American states because of injuries occasioned to their citizens as a result of civil wars, strikes, or other internal disorders;

(b) responsibility of states for the acts of insurgents who have succeeded so far as to constitute a new government but have afterwards been suppressed;

(c) the abuse of the employment of diplomatic agencies, practiced by some European states in support of their citizens;

(d) naval demonstrations and other methods of intimidation resorted to by those same nations in support of their diplomatic claims;

(e) responsibility of the American governments for acts of savage tribes inhabiting territory under the sovereignty of those governments, but not under their effective authority;

(f) likewise for acts of native tribes under their sovereignty and authority;

(g) likewise for acts of nomad tribes while crossing the frontiers of their territory;

(h) likewise for the acts of civilized individuals or native tribes committed in disputed territory.

8. *Problems relative to the attitude which the states of America should observe in case of civil war in another state of the same continent:*

(a) in case the civil war results in secession;

(b) to what extent they should observe neutrality in case of civil war, and the best manner of observing it;

(c) international measures best suited to prevent or suppress civil wars.

PROBLEMS WHICH, BECAUSE OF THE SPECIAL POLITICAL ECONOMIC OR SOCIAL CONDITIONS OF THE STATES OF AMERICA, RECEIVE OR ARE LIKELY TO RECEIVE A SOLUTION DIFFERENT FROM THAT WHICH THEY RECEIVE IN EUROPE:

1. *Federal States.*
2. *Confederations.*
3. *Nationality.*

CONVENTIONAL INTERNATIONAL LAW IN AMERICA:

1. *Basis of the codification of Public and Private International Law.*
2. *Conventions of universal character.*
3. *Conventions of a Pan-American character.*
4. *Conventions of a Latin-American character.*

IV

In spite of the obvious existence of an "American" International Law in the acceptation which we have just indicated, it has not been studied nor even clearly stated by the publicists either of Europe or America. American publicists, in treating any matter whatever of an international character, have simply followed the doctrines and diplomatic precedents of Europe, without inquiring whether or not such doctrines and precedents are in conformity with the fundamental institutions or the peculiar manner of life of the states of the New World.

The only publicist who seems to have grasped the idea of an "American" International Law is Alcorta;[100] but he has not expressly affirmed its existence nor indicated its fundamental characteristics, nor, much less, the matters which constitute it. On the contrary, he follows invariably the doctrines of the other European writers. Moreover, in his "Curso de Derecho Internacional Privado" (Buenos Aires, 1887) in the chapter on "Nationality," he does not

[100] Alcorta: "Cours de Droit International Public," Vol. I (the only one published), Paris, 1887, Preface, Chap. II, No. II; Chap. IV, Sec. No. VI.

even declare the distinctively American characteristics of that institution and its peculiarities in the countries of this continent.

If we are to arrive at any practical conclusion, it is that the publicists of the New World should occupy themselves particularly with the study of the matters constituting "American" International Law, clearly pointing out its salient features so that the countries of America may be able to follow a uniform policy on those matters.

And this is all the more necessary, because, with the increasing economic development of these countries will come new problems which will necessitate new norms of foreign policy — problems which may become grave dangers if the states involved are not prepared promptly to solve them on the basis of clear and well-defined principles.[101]

ALEJANDRO ALVAREZ.

[101] At the Third Latin-American Scientific Congress, which was held in Rio Janeiro in August, 1905, we, in our capacity of delegates of Chile, presented a motion to have that assembly recognize the existence of an "American" International Law in the sense which we have just indicated, and recommend its study in the universities of the New Continent. We solicited, likewise, that all the questions to be considered in the next Congress, to be held in Santiago in December, 1908, should be exclusively of an American character.

At the first Pan-American Scientific Congress, held at Santiago, Chile, in December, 1908, the following resolution was moved by the writer, and adopted: "The First Pan-American Scientific Congress recognizes that in the New World there exist problems *sui generis* or of a character completely American; and that the states of this hemisphere have regulated by means of more or less general treaties, matters which interest only themselves or which, though of a universal interest, have as yet not been incorporated in a world-wide convention. In this last case there have been incorporated in international law principles of American origin. The sum of these materials constitutes what may be called American problems and situations in international law. The Congress recommends to all states of this continent that in their faculties of jurisprudence and the social sciences special attention shall be given to the study of this subject."

NEUTRALIZATION OF THE PANAMA CANAL

The question whether or not the United States Government should construct fortifications commanding the entrances to the Panama Canal is one that must be determined by law or public policy. The law is set forth in the Hay-Pauncefote Treaty, and while this does not in terms forbid the construction of fortifications, nevertheless, the principle of neutralization which is established by that treaty imposes on us certain obligations, and if those obligations set a bar to their construction we are morally bound to abstain from constructing them. If the treaty imposes no such obligation, then the question should be determined by policy. Which is the better policy, to construct them or not to construct them?

It might be claimed that some regard should be paid to the professions we have made for more than half a century that the construction of the canal was not for our special benefit, but for the common good of the world on equal terms to all, and that to seek special advantages, such as are supposed to accrue from the construction of fortifications, lays us open to the charge of inconsistency, if nothing more. If the conditions under which those professions of philanthropy were made had changed there might be reason for a change in policy, for nations are seldom consistent except when it is to their advantage to be so. But it is evident that the existing conditions tend to strengthen our ability to adhere to our former policy. We are better able to-day to maintain an attitude of benevolence, if it may be so called, than ever before. Is it wise under these circumstances to adopt a new policy?

It is believed that it can be shown that the Hay-Pauncefote Treaty imposes on the United States, inferentially at least, the obligation to abstain from the erection of fortifications; but that whether it does, or does not, the advantages derived from them are so insignificant that it is better policy not to construct them.

Until the last quarter of the 19th century we were unable alone to protect a canal connecting the two oceans at Panama and the

idea of constructing one as a governmental enterprise, had not yet been seriously considered by the American people. Being unable to protect it ourselves without aid, we were anxious that other nations should help us to construct and to maintain its freedom of transit on terms of entire equality. This sentiment is evidenced in documents of the highest official character, which now stand out as silent witnesses to a policy of disinterestedness that we can not consistently abandon without having our motives questioned by all civilized peoples.

The Clayton-Bulwer Treaty, made with Great Britain in 1850, states, that "the contracting parties, likewise agree, that each shall enter into treaty stipulations with such of the Central American states as they deem advisable, for the purpose of carrying out the great design of this convention, namely: that of constructing and maintaining the said canal as a ship communication between the two oceans *for the benefit of mankind, on equal terms to all.*" [1]

Henry Clay, speaking for the government of the United States when he was Secretary of State, states that the benefits of the canal "ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon payment of a just compensation or reasonable tolls."

The Senate of the United States in 1835, unanimously passed a resolution requesting the President to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, "the free and equal right of navigation of such canal to all nations, on the payment of reasonable tolls as may be established, to compensate the capitalists who may engage in such undertaking and complete the work."

The House of Representatives, four years later, passed a resolution of similar import.

President Polk, in submitting the treaty made with New Granada, to the Senate, said: "In entering into the mutual guarantees proposed by the thirty-fifth article of the Treaty, neither the Govern-

[1] The italics are the author's.

ment of New Granada nor that of the United States has any narrow or exclusive view. The ultimate object as presented by the Senate of the United States in the resolution to which I have already referred, is to secure to all nations the free and equal right of passage over the Isthmus."

In 1856, President Pierce sent two commissioners to New Granada to propose the creation of an independent neutral district on the Isthmus, with a view to the security of the transit route. "It is not designed," said Mr. Marcy, then Secretary of State, "to secure any exclusive advantages to the United States. To remove all objections of this sort an article is proposed securing the common use of the Panama route to all foreign nations."

General Cass in 1857, while Secretary of State, asserted in a communication to the British Government, that "the United States demanded no exclusive privileges in the interoceanic passages of the Isthmus."

Mr. Cleveland, in his first message to Congress, uses the following expression with reference to a canal: "Whatever highway may be constructed across the barrier dividing the two great maritime areas of the world must be for the world's benefit, *a trust for mankind.*" [2]

In September, 1869, Mr. Hamilton Fish, Secretary of State, in a letter to Mr. Hurlbut, Minister to Colombia, states that President Grant regards the canal as an American enterprise, and he "desires it to be undertaken under American auspices, to the benefit of which the whole commercial world should be fully admitted."

In a letter to the Secretary of State, Mr. Rives, our Minister to France, tells of an interview he had with Lord Palmerston, in which he said to him that, * * * "The United States sought no exclusive privilege or preferential right *of any kind* in regard to the proposed communication, and their sincere wish, if it should be found practicable, was *to see it dedicated to the common use of all nations, on the most liberal terms and a footing of perfect equality for all.* That the United States would not, if they could, *obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind.*"

[2] The italics are the author's.

The foregoing official utterances and the publications of private citizens, both of which might be multiplied indefinitely, show that the people of the United States, while they felt a great interest in the construction of the canal, advocated it from no selfish motive. We were not only willing but anxious that others should enjoy its benefits in common with us. As the nation grew stronger, a less liberal spirit developed, which culminated in the policy of national ownership, as well as exclusive control and management, to the end of giving to the United States supposed military advantages. In furtherance of this idea, the construction of fortifications commanding the entrance to the canal is now advocated, and it is claimed that such construction will not be in conflict with the obligations of neutrality which we have assumed in the Hay-Pauncefote Treaty.

The disastrous failure of De Lesseps at Panama and the less disastrous, but no less complete, failure of the Maritime Canal Company at Nicaragua, demonstrated the magnitude of the enterprise and produced an impression, not well founded, that success was only to be accomplished by this government itself undertaking the job. As a matter of fact, however, had the United States government held itself aloof and not determined to build a canal, it is quite probable that the Panama Canal would have been built by a private corporation. There was no justification for two canals, and if the United States undertook the construction of one, the other could not be financed.

There was one serious obstacle, however, in the way of the government of the United States building the canal. The Clayton-Bulwer Treaty bound both nations never to obtain or maintain exclusive control over any railway or canal across the Isthmus. Under the obligations of that treaty the construction of the canal by the United States Government was impracticable, and there seemed to be no honorable way out of the difficulty except by a supplemental treaty.

The much maligned Clayton-Bulwer Treaty was practically an alliance between Great Britain and the United States, made for the purpose of protecting and maintaining the freedom of transit across the Isthmus. Notwithstanding all the maledictions heaped on it by the American people, it was not such a bad treaty for the United

States after all. At the time it was made, Great Britain occupied a part of Central America and claimed ownership of the country at the mouth of the San Juan River, the Atlantic terminus of the proposed Nicaragua canal. It is doubtful whether or not this claim could have been successfully contested, and if it could not, it would have given Great Britain absolute control of that route, then regarded as the best, and would have placed the United States in a position of great disadvantage.

With a view, however, to giving the United States the right to build and own a canal to connect the two oceans, Great Britain, in a commendable spirit of fairness, consented to a supplemental treaty. This is known as the first Hay-Pauncefote Convention. It was approved by President McKinley and submitted to the Senate of the United States for ratification. After considerable debate, several amendments were adopted, and in its amended form it was ratified by the Senate.

The essential parts of the treaty as amended are as follows:

Article I.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Convention, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article II.

The High Contracting Parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer Convention, *which convention is hereby superseded,*[3] adopt, as the basis of such neutralization, the following rules, substantially as embodied in the convention between Great Britain and certain other Powers, signed at Constantinople, October 29, 1888, for the Free Navigation of the Suez Maritime Canal,[3] that is to say:

1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise.

[3] See Supplement, p. 123.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it.

3. Vessels of war of a belligernt shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or warlike materials in the canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this Article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered one, two, three, four, and five of this article shall apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order.[4]

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purpose of this Convention, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal.

7. No fortifications shall be erected commanding the canal or the waters adjacent. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

Article III.[5]

The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it.

The amendments made by the Senate were not satisfactory to Great Britain and she rejected it. The treaty thus failed. It

[4] Inserted by Senate.

[5] Stricken out by the Senate.

was claimed by Great Britain that one clause in Article II prohibiting fortifications, and another authorizing the United States to take such measures as it might "find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order" were not in harmony and might give rise to grave misunderstanding. It was, moreover, claimed that the amendment striking out the clause inviting other powers to become parties to the contract, would place Great Britain at great disadvantage with respect to other powers, inasmuch as she would be bound to respect the neutrality of the canal, whereas they could disregard it.

It became necessary to try again and see if the differences could be reconciled. A new treaty was accordingly negotiated by the same plenipotentiaries. This new treaty was submitted to the Senate and after some discussion was ratified without amendment and promulgated by President Roosevelt, February 22, 1902.[6]

Subsequent to the ratification of the Hay-Pauncefote Treaty, another was made between the United States and Panama, which state had seceded from the United States of Colombia. This is known as the Hay-Bunau-Varilla Treaty.[7] By means of these two treaties the United States came into possession of all the rights necessary to enable it to construct, own, manage and protect a canal connecting the two oceans, and since then its construction has been undertaken and is in progress.

The Treaty as at first approved by the Senate of the United States but rejected by Great Britain, as well as the subsequent one, which was ratified by both governments, contain some prominent features of similarity, which are of interest in the following discussion. Both treaties provided for the construction of the canal as a national enterprise, should the United States decide to construct it that way. Both provided for neutralization. In the first, the two nations jointly guarantee the neutrality of the canal, and in the second, that burden is assumed by the United States alone. It is to be noted however, that while the Senate did not object to the dual guarantee of neutrality, it did object to inviting other nations to join in it.

[6] See Supplement, p. 127.
[7] See Supplement, p. 130.

Both treaties provided that the principle of neutralization established by Article VIII of the Clayton-Bulwer Treaty was not to be impaired. The first provided that no fortifications should be constructed commanding the canal, but the second omits this prohibitive clause. In the ratified treaty an entirely new article was added, providing that any change in territorial sovereign over the region traversed by the canal, was not to affect the general principle of neutralization nor the obligations of the High Contracting Parties.

The great principle of neutralization stands out prominently in both treaties and is provided for in almost identical language, except that in the first draft, both contracting parties adopt it, and in the second, the United States adopts it.

The word "neutralization" occurs in the treaty three times, showing that the negotiators did not use it without due consideration. It seems clear that whatever may have been the meaning of the word in the minds of the plenipotentiaries and of the two governments, there can be no doubt but that it was intended that "neutralization" whatever it meant was to be established so far as it could be done by treaty between the two nations concerned. Whether or not it would have been better to have done it by a convention of the maritime nations of the world is not material. The question is, does the treaty as ratified, establish neutralization, and if so, do our obligations under it permit us to construct fortifications to command it?

The word "neutralization" is of modern origin. In ancient times he who was not a friend was an enemy. In later days, nations declined to take part in a war between others and these were called neutral nations. They were foes to neither side and sometimes friends to both. This is the oldest form of neutrality, and the status of the neutral nation was proclaimed generally by the sovereign and became binding on the inhabitants thereof.

Still later a new practice grew up. Territory was neutralized by agreement or convention, the parties interested agreeing that certain territory should be exempt from war. This had its origin in Europe, the nations taking part in such agreements being generally those whose location gave them an immediate interest. Distant na-

tions seldom took part in these conventions. The nation whose territory was neutralized was a party to the agreement, and received in consideration of the relinquishment of its rights of war some other privileges or advantages. The neutralization of Switzerland, Belgium and Luxenburg in the early part of the last century are examples of this kind of neutralization. The parties to these agreements covenant to refrain from sending armed forces into the region neutralized.

Still later another kind of neutralization came into use, namely, that of nurses and doctors in attendance on the sick and wounded in war, even when in the service of belligerents. The hospitals and ambulances of combatants were neutralized in a similar way. This was done by the Geneva Convention, which was signed by representatives of nearly every civilized nation on the globe. Still more recently the Hague Convention neutralized hospital ships in certain cases, giving them a status of exemption from capture which they did not before possess.

Another kind of neutralization is that of waterways, either natural or artificial. There are several cases of the neutralization of the former, but up to the time of the Hay-Pauncefote Treaty, only one of the latter, namely, that of the Suez Canal.[8] The peculiar interests of all maritime nations in these waterways have given rise to special rights of navigation which can not be ignored, even by the sovereign power in which the waterway may be located. In the neutralization of territory, belligerents are especially excluded from trespass; in the neutralization of waterways, freedom of passage is the essential characteristic.

John Bassett Moore, Professor of International Law and Diplomacy, Columbia University, says:

> The term neutrality in its ordinary sense, refers to a state of hostilities, and denotes the attitude and the duty of a noncombatant or neutral power toward the parties to the conflict. It signifies not only impartiality, so far at least as conduct is concerned, but also abstention from acts which may aid either belligerent in its conflict with the other. Such is the subjective use of the word. When used objectively with reference to an interoceanic canal, it embraces belligerent as well as neutral powers,

[8] See Supplement, p. 123.

and while positively referring to the former, defines the attitude and duty of both. It signifies that the thing is "neutralized," that is, it is to be treated as neutral, and, therefore, it is not to be made the subject of attack, nor distinctively employed as a means of hostilities.

Latané says:

Neutralization implies: (1) A formal act or agreement. It is a matter of convention constituting an obligation, not a mere declaration revokable at will. (2) It implies a sufficiently large number of parties to the act to make the guarantee effective. (3) It implies the absence of fortifications. The mere existence of fortifications would impeach the good faith of the parties of the agreement. (4) It implies certain limitations of sovereignty over the territory or *thing* neutralized. (5) It implies a more or less permanent condition. It differs from ordinary treaty stipulations terminated by war between the contracting parties. A treaty establishing neutralization is brought into full operation by war.

When we come to extend the same principle to waterways, however, we find the conditions to be altogether different. The first and most fundamental difference is that states have acquired by international usage and prescription, rights and interests in the territorial waters of other states, which they have no claim to exercise in respect to land. Secondly, armies and implements of war are absolutely excluded from the territory of neutralized states, *while neutralized waterways are by design open to the innocent passage of warships, not only in time of peace but also in time of war.*

Wheaton says:

Neutralization is the assignment to a particular territory or territorial water of such a quality of permanent neutrality in respect to all future wars, as will protect it from belligerent disturbance. This quality could only be impressed by the action of the great powers by whom civilized wars are waged and by whose joint action such wars may be averted.

Henderson, in American Diplomacy, says, in reference to an Isthmian Canal, that

Neutralization means an exemption from all warlike operations, and this condition can only be effected by an agreement of all parties to abstain from such warlike operations.

It will be noticed that one central idea pervades all, viz: that neutralization means immunity from war and warlike operations. In the case of neutralized territory it is immunity from war and exclusion of combatants, in the case of neutralized waterways, it is immunity from war and freedom of passage.

That immunity from war can only be secured by a convention of the nations that make war is only partially true. A state of preparedness for war, or a nation's ability to make trouble for a prospective adversary will often secure immunity. No nation will make war on another unless there is some strong reason for it, and an equally strong belief that the result will justify the undertaking. It is not improbable that the United States alone may be able to prevent war on the Isthmus. It is certain that the United States and Great Britain together can.

There are several precedents of the neutralization of natural waterways by powers less able to maintain it than the United States. The Straits of Magellan [9] are neutralized by Argentina and Chile, yet nearly every maritime nation in the world is interested in the navigation of the straits and all have thus far respected that status.

The Panama Isthmus was neutralized by the United States alone in its treaty with New Granada in 1846.[10]

The Suez Canal was at first neutralized by a decree of the Khedive of Egypt, confirmed by a firman of the Sultan of Turkey. It is notorious that these two powers could not have maintained its neutrality in the face of strong opposition; nevertheless, the neutrality, inadequate as it was, was respected, as the following incident will show. During the war between France and Germany in 1870, eighteen years before the Convention of Constantinople had gone into effect, a corvette belonging to Germany met a similar French vessel in Lake Tismah. It was the anniversary of the birth of the Emperor of France. The two vessels anchored near each other, an Egyptian vessel being there also. In honor of the Emperor, the Frenchman dressed ship and fired a salute. The German did the same. Yet if these two vessels had met in the open sea, a combat would have resulted.

To claim, however, as has been done, that the Panama Canal is not neutralized because only two nations, viz: Great Britain and the United States, have acceded to it is to deny that the United States can maintain it. Neither law nor usage prescribes the particular

[9] See Supplement, p. 121.
[10] See Supplement, p. 108.

number of powers necessary to make neutralization effective. One nation as a guarantor of neutrality may be worth a dozen.

Oppenheim, in his work on International Law, says:

> The Panama Canal, which is being built by the United States of America, is *permanently neutralized*, through Article III of the Hay-Pauncefote Treaty of November 18, 1901. But this treaty is not a general treaty of the Powers either, being concluded by the United States and Great Britain only.

He further states that

> The four neutralized states, namely, Switzerland,[11] Belgium,[12] Luxemburg,[13] and the Congo State,[14] are a product of the 19th century only, and it remains to be seen whether neutralization can stand the test of history.

In the neutralization of the Suez Canal, the central idea was freedom of passage and immunity from war. The nine nations which neutralized it are all located in close proximity thereto. The case is different with reference to the Panama Canal. All maritime nations except the United States are located far from it. The Suez Canal is owned and operated by a stock company. It is chartered by the sovereign power of the country in which it is built. The stock is largely held by individuals residing in various parts of the world. A large part is owned by the British Government, but she holds it just as the individual stockholder does. It gives her a potent voice in the management, but nothing more.

The Panama Canal is the exclusive property of the United States Government, but it is located in a foreign country, the site of which has been conveyed to us *in trust* for the benefit of the world's commerce. It was not conveyed with the idea of increasing the naval or military strength of the United States.

The preamble to the Hay-Pauncefote Treaty recites that

> The United States and Great Britain being desirous to facilitate the construction of a canal to connect the Atlantic and Pacific Oceans and to

[11] See Supplement, p. 106.
[12] See Supplement, p. 108.
[13] See Supplement, p. 118.
[14] See Supplement (January, 1909), p. 26.

remove any objection that may rise out of the Clayton-Bulwer Treaty to its construction by the United States *without impairing the general principle of neutralization established by Article VIII of said Treaty,* have for that purpose appointed as their plenipotentiaries, etc.

It is evident that the treaty recognizes, first, that a general principle of "neutralization" had been established by Article VIII of the Clayton-Bulwer Treaty, and second, that the principle so established is not to be impaired by anything in the new one.

Article VIII of the Clayton-Bulwer Treaty reads as follows:

> The Governments of the United States and Great Britain having not only desired, in entering into this Convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations, to any other practicable communication, whether by canal or railway, across the Isthmus which connects North and South America, and especially to the interoceanic communication, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

At the time the Clayton-Bulwer Treaty was made the Nicaragua route was regarded as the best and was the one under immediate consideration. The other articles of that treaty relate chiefly to that projected canal.

Article VIII extends the principle of neutralization to any other route or system of communication across the Isthmus. Four years after the treaty went into effect the Panama Railway was built. It would be interesting to know just what action the United States would have taken in maintaining the principle of neutralization established by the Clayton-Bulwer Treaty, had there been no treaty between New Granada and the United States. Every instance of intervention by the United States to maintain the freedom of

transit over the Panama Railroad, was under the provisions of the treaty with New Granada.

Now what was the "general principle of neutralization" established by Article VIII of the Clayton-Bulwer Treaty? Evidently it was protection, protection for the purpose of maintaining the canal or railway open at all times. A canal or railway across the isthmus would necessarily be constructed in the wilderness of a nation utterly incapable, unaided, of keeping it open, even if at war with a comparatively weak naval power. Moreover, revolutions were of frequent occurrence there, and these would tend to create conditions inimicable to freedom of transit. Whatever means of transit might be constructed, it was recognized that protection by some other power or powers was necessary to insure uninterrupted transit.

But protection was not all that was contemplated by the treaty. The true significance of Article VIII is only to be had by reading the other articles in connection with it. Both nations were to abstain from acts that would give either an advantage over the other. Neither was to obtain or maintain exclusive control. Neither was *ever* to erect fortifications commanding the canal or the approaches thereto. The possibility of war between the contracting parties was not overlooked, and it was provided in such case that the vessels of each nation in traversing the canal were not to be subject to blockade, detention or capture by the other. The two governments were to "guarantee the neutrality thereof, so that the canal may forever be free and open, and the capital invested therein secure." It will thus be seen that the "general principle of neutralization" established by Article VIII of the Clayton-Bulwer Treaty, which principle must not be impaired, was a broad one and included something more than mere protection.

The Clayton-Bulwer Treaty looked to the construction of a means of transit by a private company; the Hay-Pauncefote Treaty deals with the matter from a different standpoint. The older treaty is superseded, not abrogated. Those provisions that conflict cease to have any binding effect, but where no conflict exists, the spirit of the older treaty would still live. The old treaty forbade fortifications,

the new one is silent on the subject, but this silence is not to be construed as authorization.

The words "being open to the citizens and subjects of the United States and Great Britain on equal terms," which are used in Article VIII, indicate that the vessels of both nations were to be allowed to pass through the canal whenever they demanded passage. No discriminating tolls were to be exacted. No vexatious delays to be incurred by one that would not be incurred by the other. All vessels were to be freely admitted and passed through without hindrance or detention. All of this is part and parcel of the general principle of neutralization established. Is a canal guarded by fortifications, manned by military forces of the United States, "open to the citizens and subjects of the United States and Great Britain on equal terms?" A hospital or hospital ship, which is neutralized, is not provided with guns for protection; it depends on the Red Cross flag which it flies, and this emblem of neutrality is respected by all civilized nations.

John Bassett Moore, Professor of International Law and Diplomacy, says: "The idea of neutrality or of neutralization has usually been deemed incompatible even with the mere maintenance of armed forces and fortifications."

The Treaty of Vienna, which provides for neutralizing the free town of Cracow, stipulates that no armed forces should be introduced there on any pretense whatever.

The Treaty of Paris, which neutralizes the Black Sea, forbids the maintenance of armaments upon it.

In the neutralization of Luxemburg, it was stipulated that the city of Luxemburg should no longer be treated as a federal fortress.

In the neutralization of the Ionian Islands,[15] it was stipulated that "The fortifications constructed in the Island of Corfu and its dependencies having no longer any object, shall be demolished."

The treaties which effected the neutralization of the lower Danube[16] and the works constructed in aid of its navigation, provided that all the fortresses and fortifications existing on the course

[15] See Supplement, p. 116.
[16] See Supplement, p. 114.

of the river from the Iron Gates to its mouth should be razed and no new ones erected.

In the treaty between Chile and the Argentine Republic, the Straits of Magellan were neutralized forever, and their free navigation is guaranteed to the flags of all nations. To insure this neutrality and freedom it was agreed that, "no fortifications or military defense *which might interfere therewith shall be erected.*"

After the separation of Belgium and Holland in 1830, the Powers agreed that as the neutrality of Belgium had been guaranteed, it was regarded as necessary that the Belgium fortresses of Nimi, Ath and others should be demolished.

The Treaty of Constantinople that neutralizes the Suez Canal, expressly forbids the erection of fortifications to command it or its approaches.

Professor Moore says further: "The idea of erecting fortifications even if no offensive or hostile use of them be intended for the purpose of preserving neutrality is novel in public law."

Article II, of the Hay-Pauncefote Treaty, provides that the United States Government, "should have and enjoy all the rights incident to such construction, as well as the exclusive right of regulation and management of the canal." Protection of a thing constructed may be fairly considered as "an incident to construction." The construction of the canal would never have been undertaken, if after it was built, it could not be protected. But fortifications are not necessarily required for protection. The construction of fortifications to command the canal was specifically forbidden in the Clayton-Bulwer Treaty, though the treaty provided for protection. They were also forbidden in the first draft of the Hay-Pauncefote Treaty, though that treaty was amended by the Senate in other respects. When, therefore, protection is claimed as an incident to construction, it can not be assumed that the protection is necessarily to be by means of fortifications. Protection is provided for the Suez Canal, in the Treaty of Constantinople, but fortifications are forbidden.

Again, Article II, of the Hay-Pauncefote Treaty reads, that the United States is to "enjoy all the rights incident to construction,

as well as the exclusive right of regulation and management, *subject to the provisions of the treaty.*" The rights of regulation and management, as well as those incident to construction are, therefore, limited. What are the provisions of the treaty that limit the rights incident to construction, and to regulation and management? One is, that the canal is to be free and open to vessels of *commerce and war* of all nations on terms of entire equality. Another is, that there is to be no discrimination in respect to conditions and charges of traffic or *otherwise*. It may be assumed that there will be no discrimination in respect to charges of traffic, that the tolls levied will be equitable and just, but the word *otherwise* has some special significance, and would seem to be intended to cover every other contingency that might arise in respect to the passage of vessels through the canal. In other words, that under all circumstances, at all times, and under all conditions, passage was to be granted, provided the rules regulating the same were complied with. If that be the case, the canal would be on the same footing as the Suez Canal, open in time of war as in time of peace to all that comply with the rules, and fortifications can not be claimed to be needed to enforce compliance with the rules.

Could a nation at war with the United States fairly comply with the rules and send its fleet through the canal? The answer is an emphatic "no." No nation would send its ships through the canal in time of war with the United States without first taking measures that would render their passage safe beyond all chance. It would be necessary to remove all *possible* enemies including the lock tenders, and this would be an act of hostility in violation of the rules. The peaceful passage through the canal in time of war of an enemy's fleet is, therefore, out of consideration.

The first sentence of Article III of the Hay-Pauncefote Treaty states, that the "United States adopts as a basis of neutralization of such ship canal the following rules substantially as embodied in the Treaty of Constantinople signed the 29th of October, 1888, for the free navigation of the Suez Canal." Then follow six rules taken almost verbatim from the latter treaty. These rules form the ground work of the Hay-Pauncefote Treaty. They are not for

time of peace alone, but for time of war as well. Indeed, Article III, contains stipulations that can only become operative in time of war.

It has been claimed that the treaty will be annulled by war between the signatory powers. But will it? That treaties are generally annulled by war is true, but not such treaties as the Hay-Pauncefote Treaty. If its provisions are not binding in war, what are they for? Why stipulate that the canal shall never be blockaded if on the breaking out of war the stipulation does not hold? Great Britain could not blockade the canal in time of peace. Why stipulate that no right of war nor any act of hostility shall be committed within it? An act of hostility would not be committed in time of peace. The treaty was made to meet war conditions, and must be binding on the parties to it. That the United States or Great Britain might give no heed to it when war breaks out, is true, but it would be a breach of faith, and it would receive, as it would merit, the just condemnation of all civilized powers.

Mr. Justice Washington, in handing down a decision of the Supreme Court said:

> We are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between two governments. Treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity, and to deal with a case of war as of peace, *do not cease on the occurrence of war.*

The United States declined to accept the doctrine of the annulment of treaties by war, in 1898, when war existed between the United States and Spain. The United States on that occasion claimed that Article XIII of the Treaty of 1795, being expressly applicable to war between the contracting parties, was not abrogated thereby.

Oppenheim says:

> The doctrine was formerly held, and a few writers maintain it now, that the outbreak of war, *ipso facto*, cancels all treaties previously concluded between the belligerents, such treaties only excepted as have been concluded especially for the case of war. The vast majority of modern writers on international law have abandoned this standpoint and the opinion is pretty general that war by no means annuls every treaty.

But unanimity in regard to such treaties as are and such as are not cancelled by war, does not exist * * * It is obvious that *such treaties are not annulled as have especially been concluded* for the case of war, as treaties in regard to the neutralization of certain parts of territories of belligerents for example.

The first sentence of the Hay-Pauncefote Treaty recognizes the fact that the Suez Canal is a neutralized waterway. It is also clear that the neutralization of the Suez Canal means its freedom of navigation and immunity from war. Can there be any doubt that the neutralization of the Panama Canal means the same? The Hay-Pauncefote Treaty goes even farther than the Constantinople Convention, in its recognition of the neutralization of the Suez Canal, for the word neutralization is not mentioned in the Constantinople Convention. It was purposely excluded from the latter to prevent any misunderstanding of the status of the canal. That status was not to be made dependent on the meaning of a word, about which, at the time, there was some dispute. As a matter of fact, it was the British Government which objected to the word "neutralization" in the Treaty of Constantinople, and that government was represented in the negotiation of the Hay-Pauncefote Treaty by the same Lord Pauncefote, who represented it in the negotiation of the Constantinople Treaty. He did not object to the use of the word in the Hay-Pauncefote Treaty, he may even have advocated it. It is probable that the word was agreed to by both negotiators, because it fitted the case in hand better than any other.

The United States has for more than fifty years been the sole guarantor of the neutrality of the Panama Railroad, and its sufficiency has never been questioned. When the freedom of transit has been threatened, as it has been on numerous occasions, the forces of the government have intervened to maintain the neutrality of the Isthmus, and it has always accomplished the task without friction with any nation whose commerce was passing over the railway.

It may be claimed that a nation can not neutralize its territory or other possessions merely by a treaty with another power. This is true with respect to its ordinary possessions, but the Panama Canal is not an ordinary piece of property. The ownership of the

land on which the canal is being built was conveyed to the United States for a special purpose, and is held *in trust* to secure the execution of that purpose. The entire world is interested in its accomplishment and perpetuation. It stands thus on a different footing from other possessions. After the canal is opened to navigation and the trade of nations flows through it, as it will, those nations will have acquired rights in respect to its use, which could never be claimed with respect to other property of the United States. The words "neutralize" and "neutralization" have of late years acquired a meaning when applied to waterways that is novel. The neutralization of the Suez Canal has brought these words into familiar use, and given to them a broader significance than they formerly had. It is only a short time since it was claimed that the Suez Canal was not a neutralized canal, because belligerent ships were allowed to pass through it in time of war. To-day that is the main feature of its neutrality.

The words, "The United States adopts as a basis of neutralization," show that whether the word was used strictly in its legitimate sense or not, it had a meaning, understood by the negotiators and by the two governments; that it meant freedom of transit and immunity from war, and if this is a broader meaning than would have been given to the word a few years ago, it is because there was no other more suitable one in the English language to describe the conditions sought to be established. Except that of the Suez Canal, there had never been in the history of the world a case of neutralization of an artificial waterway.

The absence of the words "in time of war as in time of peace" from clause 1, Article III, of the Hay-Pauncefote Treaty, has given rise to the belief in some quarters that they were omitted at the instance of the United States for the purpose of giving the United States the power of closing the canal to the vessels of an enemy in time of war. Be this as it may, the vessels of a nation at war with the United States will not seek passage through the canal — those of commerce are not likely to reach it if our navy performs its duty on the open sea, and those of war will not place themselves so completely at the mercy of their enemy. The neutral area extends

out only three miles from shore. The omission, therefore, of the words, "in time of war as in time of peace" from clause 1, Article III, is not important.

The Treaty of Constantinople reads: "The Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of war or commerce, without distinction of flag." The Hay-Pauncefote Treaty reads: "The canal shall be free and open to vessels of commerce and war of all nations observing these Rules on terms of entire equality." It can not be said that these provisions are identical in meaning, but neither are the conditions in the two cases. Both cover the same ground, but in different ways. Both aim at the same target; viz: immunity from war and freedom of passage.

The Treaty of Constantinople was made by nine different nations speaking different languages. It was important that ambiguity should not arise from translation. The Hay-Pauncefote Treaty is a treaty made by two nations, speaking a common language. There is no danger of misunderstanding from translation, whatever there may be from other causes.

Clause 2 of Article III of the Hay-Pauncefote Treaty, as finally ratified, provides that, "The United States, however, shall be at liberty to maintain such military police along the line of the canal as may be necessary to protect it against lawlessness and disorder." The army is an organization provided for by law, officered and equipped for regular military service and used for attack or defense. It may perform the duties of a military police and often does, but its chief function is fighting the organized forces of an enemy. The military police referred to in the treaty, on the other hand, is designated to suppress "lawlessness and disorder," both of which may result from the presence of turbulent and unruly characters on the isthmus rather than from the armed forces of an enemy. It would seem, therefore, that a special organization was referred to, because of the absence of fortifications. Had fortifications been contemplated, there would always be present an organized military force, and this force would always be available to suppress lawlessness and disorder. The first draft of the treaty as amended by the

United States Senate contained, a provision prohibiting the erection of fortifications and authorizing the maintenance of a military police to suppress "lawlessness and disorder." The authorization of a military police seems to follow as a corollary to the prohibition of fortifications. The second treaty which was ratified by both governments contained the same authorization of a military police, but the specific prohibition of fortifications was omitted. The inference seems clear, that the authorization of the military police in the second treaty was inserted, because, inferentially, though not in specific terms, fortifications were prohibited.

The same clause, Article II, states that "no right of war shall be exercised nor any act of hostility committed within it" [the canal]. The erection of permanent fortifications by the United States in time of peace may not be the exercise of a right of war, but it is a preliminary step in that direction. Their erection is an admission that they are intended to be used. If they be used, a right of war will be exercised. The prohibition, therefore, of their erection would seem to be superfluous. The canal must, of course, be protected, but it need not be by fortifications.

The Senate Committe on Foreign Relations, when it made its report on the first Hay-Panucefote Treaty, said: "Whatever canal is built in the Isthmus of Darien, will be *ultimately made subject to the same laws of freedom and neutrality as governs the Suez Canal, as a part of the laws of nations.*"

The treaty with the Republic of Panama provides, that the cities and harbors of Colon and Panama, though both are in the Canal Zone, are not transferred to the jurisdiction of the United States, but that those cities and harbors remain within the jurisdiction of the Republic of Panama. The construction of fortifications will, therefore, practically make both Colon and Panama fortified towns. Panama may be said to be so already, because there exists to-day a fort erected many years ago to resist the incursions of pirates. Colon, however, is a more modern town, having been built since the completion of the railroad and has no defenses. Some of the guns needed to defend the Colon entrance to the canal would be located in the town itself. But are we not morally bound to abstain from

putting the little republic in the unenviable position of being ground between the upper and nether millstone? Ought we to render those towns, by fortifying them, liable to bombardment in time of war? The practice of bombarding unfortified towns has been condemned as illegitimate warfare, but fortified towns can not claim immunity.

Article XVIII of the Treaty with Panama reads: — "The Canal when constructed, and the entrances thereto shall be *neutral in perpetuity.*" * * *

Article XV reads: — "For the better performance of the engagements of this Convention and to the end of the efficient protection of the canal and the *preservation of its neutrality,* the Government of the Republic of Panama will sell, etc."

There can be no doubt as to the meaning of these two sentences. It is not necessary to go back to the circumstances leading up to the conclusion of the treaty to determine what is menat by "*neutral in perpetuity*" and "*the preservation of its neutrality.*" Those circumstances throw no light on the meaning of the words. Their true meaning is to be found in the general understanding of English speaking people, and not on circumstances leading up to the making of the Treaty.

Article XXIII of the treaty with Panama reads: — "If at any time it should become necessary to employ armed forces for the safety or the protection of the canal * * * the United States shall have the right * * * to establish fortifications." This is clearly the grant of a right to construct fortifications after the necessity has arisen. Surely, we can not claim the right to construct them in time of peace on this grant of authority.

It has been thought by some that inasmuch as a clause was incorporated in the first treaty forbidding fortifications, which clause was omitted in the second, the omission was for the purpose of giving us the right to construct them. This is not a fair conclusion. It might with equal justice be claimed, that the omission of the clause giving the United States the right to take such measures as it might find necessary for the security by its own forces the defense of the United States and the maintenance of public order, which was inserted by the Senate in the first, but omitted in the second, deprived

the United States of this right. Both were in the first treaty as amended and ratified by the Senate only, and both were omitted in the second which was ratified by both governments. As a matter of fact, they were both omitted at the suggestion of the British Government, because they were not believed to be in harmony and were likely to cause misunderstanding. The treaty was a compromise of conflicting views of the Senate of the United States and the British Government. Each side yielded points to the other for the purpose of reaching agreement, but the general theory on which the first treaty was based, was adhered to as closely as could be done under the circumstances.

We are told by the advocates of fortifications that the Hay-Pauncefote Treaty does not establish neutralization, that the language is ambiguous and that the treaty should have been concurred in by a large number of powers to render the guarantee of neutrality effective. This claim practically admits that neutralization and fortification are incompatible. But can we claim that we have acquired the right to construct the canal as a governmental enterprise, which we could not do while the Clayton-Bulwer Treaty stood in the way, and yet have incurred no obligation to neutralize it after construction? It can scarcely be maintained that all the treaty is ambiguous. The words, "the United States adopts as the basis of the neutralization of such ship canal the following Rules," etc., seems clear enough. They show that it was the intentions of the United States to neutralize the canal and the foundation on which such neutralization was to rest, were certain rules taken almost verbatim from the Treaty of Constantinople which neutralized the Suez Canal. There is no doubt that the British Government as well as our own, understood, at the time the treaty was made, that it neutralized the canal and that is unquestionably the understanding of the British Government to-day. That other nations were not invited to accede to its terms is our own fault, if there be a fault. They would gladly have done so, but we did not want them to become parties to a treaty that might be construed as giving them a right to meddle in Isthmian affairs.

It is incredible that two such men as John Hay, late Secretary

of State, and Lord Pauncefote, the British Ambassador, who negotiated the treaty, could have been ignorant of the meaning of the word " neutralization ", which is used repeatedly in the treaty. It is equally incredible that they should have known its meaning and yet have used it in an imporoper sense. Moreover, the Senate of the United States must take its share of the blame, for it allowed the word to remain in it. The treaty was not negotiated in a day, several years were spent in its discussion. There can be no doubt that a clear understanding of the word was had, and that its meaning as used in the treaty, was in accord with the popular one at the time existing in this country and in Europe.

The following is taken from the report of the Committee on Foreign Relations of the Senate that had charge of the Hay-Pauncefote Treaty:

> No American statesman, speaking with official authority or responsibility, has ever intimated that the United States would attempt to control this canal, for the exclusive benefit of our Government or people. They have all, with one accord, declared that the canal was to be neutral ground in time of war, and always open, on terms of impartial equity, to the ships and commerce of the world.

The same Committee states that:

> the United States can not take an attitude of opposition to the principles of the great Act of October 22 (29), 1888, without discrediting the official declarations of our Government for fifty years on the *neutrality* of an Isthmian Canal and its equal use by all nations, without discrimination.

The following extract from a letter of Lord Landsdowne to Mr. Hay, Secretary of State, has been quoted as proof that Great Britain conceded the right to construct fortifications at the request of the United States:

> I understand that by omission of all reference to the matter of defense, the United States Government desires to reserve the power of taking measures to protect the canal, at any rate, when the United States may be at war, from destruction or damage at the hands of enemies * * *. I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures of the defense of the canal at a moment when they were themselves engaged in hostilities.

At first sight, this letter might seem to concede to us the right to fortify the entrances to the canal in time of peace, but a little consideration will show that it makes no concession of anything. This is a letter from a skilled diplomat. He understands that, "the United States Government desires to reserve the power of taking measures to protect the canal, *at any rate,* when the United States may be at war." It is difficult to say what Lord Landsdowne had in mind when he penned those lines, but it is not difficult to see that he was not conceding to the United States a right to erect fortifications in time of peace.

Article IV of the Hay-Pauncefote Treaty, provides that the "general principle of neutralization and the obligation of the High Contracting Parties under the present Treaty, are not to be affected by any changes in territorial sovereignty or the international relations of the country traversed by the Canal." This is another evidence that the canal is neutralized by the Hay-Pauncefote Treaty, and that it was intended that it should remain so forever, even though Panama should in the future become a part of the United States, the possibility of which is not difficult to imagine.

In framing the Hay-Pauncefote Treaty, there was one evident intention on the part of the negotiators as well as of the two governments concerned; namely, to model the treaty as nearly on the lines of the Treaty of Constantinople, as the difference in conditions would permit, and it is far from clear how the difference in conditions affects the question of fortifications.

Article V of the Clayton-Bulwer Treaty states that the contracting parties (Great Britain and the United States) "further engage that when the canal shall have been completed, they will protect it from interruption, seizure or unjust confiscation, and that they will *guarantee the neutrality thereof, so that the said canal may be open and free,* and the capital invested therein secure." This is a case of only two powers guaranteeing the neutrality of the proposed Nicaragua Canal. It was not built, it is true, but the treaty was made and its stipulations were binding. If Great Britain and the United States could neutralize the Nicaragua Canal, the same powers can neutralize the Panama Canal.

It is believed that the following conclusions may be safely drawn from the foregoing discussion:

First, that the Hay-Pauncefote Treaty is intended to neutralize and does neutralize the Panama Canal.

Second, that neutralization of the canal means immunity from war and freedom of trnasit; that this freedom of transit extends to all vessels of every nationality without distinction of flag, at all times, in war as in peace, *provided they comply with the rules established by Article III of that Treaty.*

Third, that the sufficiency of the guarantee is not dependent on the number of powers consenting to it, but on the ability of the guarantors to make it good.

Fourth, that the construction of permanent fortifications in time of peace is repugnant to the idea of neutralization and we are, therefore, legally as well as morally, bound to abstain from their construction.

Setting aside, however, all considerations of technical or moral responsibility, and viewing the matter from the standpoint of expediency alone, it is still claimed that fortifications commanding the entrances to the canal are not demanded for defense, and that under the conditions that exist or are likely to exist, their disadvantages more than offset any supposed advantages.

The first question that occurs to the average inquirer is, "what is the object of fortifications and will they after construction accomplish the object sought?" A full discussion of this general question opens up a field too broad for consideration here. It will suffice to state, that the object of fortifications at the entrances of the Panama Canal is to protect it and aid in keeping it open to the passage of vessels, at least our own, at all times and under all circumstances. If fortifications would accomplish these objects or materially aid in their accomplishment, the question of their construction might be an open one. But if they will not protect the canal against the *most probable dangers* to which it is exposed, nor materially aid in so doing, then their construction should not be undertaken.

It may perhaps be claimed that a few twelve-inch guns and mortars together with some torpedoes could prevent a hostile fleet from enter-

ing the canal and from bombarding it from outside. Admitting this, it may be said in reply, that no commander of a hostile fleet would think of entering or passing through the canal without first getting complete possession, and that there is far more danger of bombardment of a fortified canal than there is of an unfortified one. Moreover, there are other ways of meeting both contingencies. The plans of the canal do not expose the locks, dams or regulating works to distant bombardment, and the Hague Convention, which was adopted by all maritime powers, forbids the attack or bombardment of villages, towns, habitations or buildings which are not defended.

It may be asked, if no fortifications are needed to guard the entrances to the canal, why do we construct them to protect the entrances to our harbors and coast cities? The answer is, that the conditions are entirely different. Fortifications for the protection of a harbor or city on our coast, stand on an entirely different footing from fortifications commanding the entrances to the canal. A town or harbor of the United States can not be cut off from interior support by a fleet outside, no matter how strong the latter may be. The country may be inconvenienced, even greatly inconvenienced, but communications by water with other parts of the nation through a blockading fleet are not essential. The blockade of a city or harbor of the United States is a serious matter, but not vital. If New York were blockaded there are other cities and towns on the coast that would, in a measure at least, supply its place. But the blockade of the Panama Canal is a no less serious matter to the United States, in time of war, than its destruction. So far as its usefulness is concerned, it might just as well be destroyed.

Fortifications commanding the entrances to harbors on the coast are needed to protect them when the navy is absent. A well fortified harbor may even get along without the navy, at least for a time, but at the isthmus the presence of a fleet within striking distance is essential to the safety of the canal if it be threatened by a strong naval power. Fortifications defending a harbor on the coast have the support of the almost inexhaustible resources of a prosperous country behind it. Their strength and the resources behind them will often deter an enemy from attack. On the isthmus they rather

invite attack, for no matter how strong they may be in themselves, when once they are isolated, they become weak, and the presence of a strong fleet outside may isolate them.

The canal is far away, located in a region absolutely devoid of supplies, with practically no roads and dependent wholly, for safety, on the long line of communications over the water. That line can only be maintained by the navy, which means that we must hold naval command of the sea in the vicinity of the canal. If we hold that command, fortifications are unnecessary. If we do not hold it, we can make no use of the canal. Do fortifications commanding the entrances to the canal help the navy in maintaining that control? It may be said that in a measure they do; but to such a limited extent that their cost and other disadvantages more than compensate.

It may be assumed that some part of the navy will always be present at the Isthmus, and in time of threatened danger another and larger part will be within supporting distance. The part that is there permanently may consist only of obsolete battleships and submarines; these will afford all the protection needed against a sudden dash of a few fast cruisers, but nothing less than a powerful fleet will suffice to ward off a real attack or prevent blockade of the canal.

It may be thought that the position of the canal in Central America and its distance from the United States are themselves reasons for constructing fortifications for its defense. But a little thought will dispel that illusion. A fortified canal becomes essentially a military outpost and yet it is radically different from one in its relations to the military powers of the government. An outpost may be abandoned without serious consequences; indeed, sometimes with positive advantage. The military outposts established in Hawaii and the Philippine Islands depend largely on fortifications for defense. As outposts, however, they might be captured, isolated or destroyed, and yet their loss would not entail serious consequences in war. On the other hand, the destruction, capture or isolation of the canal would entail irreparable mischief. The mere presence of a hostile fleet in its vicinity would be so serious a matter that considerable risk would be taken in giving

battle in order to drive it away, and the successful blockade of the canal would be almost as fatal as its destruction. The enemy must be kept at a distance from it, which means that the defense of the canal must be made as far from it as possible.

In order to attack the canal with any prospect of success the enemy must provide himself with coal and supply stations. It must not be necessary to send a ship thousands of miles away to get a supply of coal or to make repairs which are constantly required. These facilities, which can not be readily improvised, must be available close to the canal, and without them a fleet is weakened to the extent that a part of it is always absent. Great Britain and the United States are the only nations that have naval supply stations near the canal, and Great Britain, therefore, is the only single power that we need fear at the present time.

The proximity of some of the strong naval powers to the Suez Canal, renders that canal more vulnerable to attack than the Panama Canal. No European or Asiatic nation can reach the latter without crossing an ocean. Even with good naval bases on this side, the crossing of the ocean by a hostile fleet for the purpose of attacking the canal would be, if the existing relative strength of the navies of the world is maintained, extremely hazardous. We need go no further back than to the Russo-Japanese War to establish this fact.

It is assumed that an army will be placed on the Isthmus in time of war whether fortifications to command the entrances be built or not. A secure line of communications with that army is an absolute necessity, and it can be maintained only by vessels sailing the sea. One overland is an impossibility. In time of war, a stream of vessels will be plying back and forth carrying men, munitions of war, and supplies of all kinds. That line must be protected at any cost. All the fortifications that can be constructed on the Isthmus will avail nothing in keeping that line open, and the little benefit that the navy would get from their construction can be gotten in other ways. To hold the canal without the ability to use it would be like owning a gold mine without the ability to extract the precious metal from it.

If fortifications are to be constructed, their character and extent,

the object they are to fulfil, and the size of the proposed garrison will, of course, be decided on beforehand. When the climatic and other conditions are taken into consideration, it is obvious that no less than double the force required to garrison the more healthful places in the United States will be required. Without undertaking to form an estimate of the force required for this purpose, it is obvious that it would exact a tribute from the Treasury, that would be burdensome and, the chances of Congress failing to make the needful appropriations is a contingency that should not be overlooked. Our policy has been and always will be, to keep our military forces down to the lowest notch until war is actually upon us. Our coast defenses are to-day a source of solicitude owing to the fact that we have scarcely enough men to keep the rust from ruining the guns.

The canal, after it is open to navigation, will become a highway of the world's commerce, for, though the distance between the most important European ports and those of the East, is shorter by way of the Suez route than by way of Panama, still, there will unquestionably be a large foreign traffic through it, and all maritime nations of the world will have acquired rights of navigation that can not be ignored, no matter how inconvenient it may be to ourselves to recognize them. New trade routes will be established which never before existed, and the neutral nations creating them will insist on maintaining them. That this will bring about conditions requiring tact and delicacy in handling can not be doubted. Anything that endangers the freedom of that traffic, such as war between the United States and a maritime power is likely to do, will cause an uneasy feeling on the part of neutrals, and the waters adjacent to the Isthmus will see an accumulation of warships representing those nations. In what way will those conditions affect the question of fortifications? The question answers itself. Fortification and neutralization are not in harmony. According to generally accepted opinions, there can be no neutralization with fortifications and vice versa, the erection of fortifications destroys neutralization. Indeed, the defense of the canal by means of forts, as already stated, is based by its advocates on the theory that there is, in reality, no neutralization of the canal under the Hay-Pauncefote Treaty. As this sentiment

finds adherents in our own country, we must expect others to take that view in other countries. The danger of complication as a result of the construction of fortifications is far greater than the danger to the canal from lack of them.

The canal, so far as respects foreign nations, is, to all intents and purposes, purely a commercial canal. It can not be said to have great military value to any foreign nation, Great Britain alone excepted, and no single nation, not even Great Britain, under existing conditions, could hold it permanently against the power that could ultimately be exerted by the United States. Its loss or prospective loss might induce us to accept terms of peace, that under other circumstances, would not receive consideration, but the inducement of any foreign nation to attack the canal would arise from the injury its loss would be to us and not from the gain to him. Indeed, the capture of the canal by a foreign power might prove to be too heavy a burden for him to carry.

To deprive the United States of its use in war it is not necessary, however, to send a fleet to the Isthmus. A few resolute men landing on the coast nearby could cut an embankment or destroy a lock with a few sticks of dynamite which they could carry on their person. The perimeter of Lake Gatun will be many miles in length, with remote spots where a break could be made in a few hours. Fortifications commanding the entrances afford no protection whatever against this danger. A military police, strong enough to keep up a constant patrol of the weak spots, is what is needed, not forts.

The fear has been expressed that if the entrances to the canal were not defended by fortifications, an enemy in time of war might, by taking advantage of its neutral character, pass through it to attack our cities on the opposite side. Nothing more unlikely to happen could be imagined. No naval commander, be he ever so rash, would be willing to put his fleet so completely at the mercy of his enemy. The canal will have several locks, and when a ship is in one, it will be at the mercy of the lock tenders. When an enemy comes to the canal with the intention of passing through it, he will first try to get possession. To get possession, he must first destroy our fleet which will oppose him outside. After that he must destroy or

capture the army and such part of the navy as will oppose him inside, all of which will be no small undertaking. As a last resort the canal can be disabled by our own forces if needful, to prevent his using it.

In a war between the United States and any single non-signatory power, it is practically certain that with our present naval resources we could keep an unfortified canal open without assistance from any other power. In a war between the United States and a number of non-signatory powers, whose combined strength would be sufficient to menace the safety of the canal, we might reasonably expect that the jeoparded interests of British commerce would come to our assistance, and with British help we could keep the canal open against the world.

When the Russo-Turkish war was in progress in 1877, the British Government, feeling some concern as to the action of Russia in her operations against the Turks with respect to the Suez Canal, sent word to the Russian Ambassador, that

> an attempt to blockade or to otherwise interfere with the canal, or its approaches would be regarded by Her Majesty's Government as a menace to India and a grave injury to the commerce of the world. * * * Her Majesty's Government has formally determined not to permit the canal to be made the scene of any combat or warlike operation.

This was ten years before the Treaty of Constantinople. Great Britain "*is determined not to permit the canal to be made a scene of any combat or warlike operation.*" In other words, she did not propose to allow any force to go to the canal with warlike intentions. She would destroy it before it got there. That is the true and only effectual means of defense. Would she not in the same way aid in keeping the Panama Canal open, if the latter be unprotected by fortifications?

Suppose, on the other hand, the war was with Great Britain. Would not the other maritime nations of the world come to our assistance? This is not a safe reliance, it is true, but after commerce has become accustomed to the new route, and new lines of traffic have been established, anything that looks to a possible interruption of traffic would be regarded as a great calamity by all nations. It

is reasonable to expect them to do those things that will protect their interests.

The idea has been suggested that the canal could be made a good base of operations for our navy; that the large fresh water lake would be a convenient place in which to clean the bottom of our ships and assemble them in readiness for service in either ocean. The idea is fallacious. For operations against the South American or Central American states it would be of service, but for operations against any of them, a naval base is not needed, at least, none other than we already possess. For offensive operations against a European or Asiatic power, it is unsuitable as a base. As a means of transferring our fleet from one ocean to the other, or of dividing it and yet keeping the two parts within supporting distance of each other, the canal will be of great value. In fact, this is its greatest value from a military standpoint, but fortifications do not add to the canal's facilities. A wide, deep channel and commodious locks that will enable a fleet to pass from one ocean to the other in the shortest time, is the important consideration.

The canal will possess one drawback as a base of operations. The channels of exit are long and narrow. An inferior fleet on the outside could bottle up a stronger one inside. The length and narrowness of the channels restrict the formation of a fleet coming out to that of a single column of ships at intervals. An enemy on the outside could deploy and concentrate a heavy fire on the leading ship, to which the latter could reply by only part of her battery. The chances are the leading ship would be sunk before she could get out of the canal, thus blockading the channel for these that follow. In Limon Bay the outer end of the channel is some distance beyond the land on which the shore batteries would be built. In Panama Bay this objection would not be so serious, as batteries can be established on islands in the harbor.

We now hold positions in the Carribean Sea and Gulf of Mexico that control, in a measure, the approaches to the canal from the eastward. If we held similar positions in the Pacific, our control on the west side would be greatly strengthened. The Gallapagos Islands are well located for controlling the approaches from the west. These

islands belong to Ecuador, and some of them might possibly be purchased for the purpose stated. There are no other islands in the Pacific Ocean that would serve the purpose so well. With the Gallapagos Islands on one side, and stations already held in the Carribean Sea and Gulf of Mexico on the other, backed by a strong navy, no force from east or west could reach the canal, without exposing its line of communication to a dangerous flank attack. Consequently an enemy would be compelled to take these places first, which could be made a very difficult operation. Our position in respect to the canal ought to be similar to that of Great Britain with respect to the Suez Canal. Commanding as she does the Mediterranean and Red Seas, she holds the keys to both entrances to the canal which gives her complete control, and this she could not get from fortifications covering the entrances alone.

With all the defensive appliances that engineering skill, backed by almost inexhaustible resources, could supply, Port Arthur could not hold out against the Japanese after they got control of the China Sea. Twice within the last twenty years Port Arthur, though strongly fortified, has been taken by the Japanese after securing control of the sea in the vicinity. We took Cuba and Porto Rico after our supremacy on the Carribean Sea had been established. We practically captured the Philippines when Dewey destroyed the Spanish fleet at Manila, which gave us command of the waters of that archipelago. It is extremely doubtful whether or not the British could have subdued the Boers if their control of the sea could have been disputed. Napoleon lost Egypt in the naval battle of the Nile. Great Britain herself can not be invaded as long as she controls the seas around her as she does to-day. Many instances might be cited, showing that a nation's outlying possessions can not be held in a war with a power otherwise strong, that controls the sea in their vicinity. The defenses of the canal is a naval function. If our navy be unable to protect it without the little assistance it would get from fortifications, it will not be able to do so with them.

The canal from a defensive standpoint has an advantage in a double line of communications. The one on the Pacific side is long, but not easily reached by the enemy; that on the Atlantic side is

comparatively short and is more vulnerable. If either be broken, it is probable that the other could be maintained intact, in which case communications with the Isthmus would be kept up. Both would have to be broken to prevent us from reinforcing an army on the Isthmus.

The erection, in time of peace, of fortifications to command the entrances to the canal will give to the maritime nations of the world grounds for believing that in so doing, we are failing to observe the obligations of the Hay-Pauncefote Treaty, and what is worse, the belief would not be without foundation. The United States can not afford to be placed in such an equivocal position. It may confidently be predicted that if we abstain from erecting fortifications the canal will soon come to be recognized and accepted by all nations as a neutralized waterway in the fullest meaning of that term.

If the stipulations of the Hague Convention amount to anything, it is far better to abstain from erecting fortifications, because, in that case the canal will not be in danger of attack. Article XXV of that convention, which was agreed to by all the maritime nations of the world, stipulates that "the attack of towns, villages, habitations or buildings which are not defended is prohibited."

There is a popular belief that if fortifications are built to command the entrances to the canal, it can be kept open to our own ships in time of war and closed to those of the enemy. This is an error. In order that the United States may enjoy the benefits and advantages of the canal in time of war, it is necessary that access to it and egress from it should be free and unobstructed; but access to it and egress from it can only be had, in time of war, while our fleets command the waters near the entrances. If the canal be blockaded by a hostile fleet, it will be of no more use to the United States than if it had never been built. Fortifications will not save it from blockade, no matter how many guns may be mounted to command the entrances.

It must not be forgotten that the Panama Canal is an artificial waterway very unlike a natural one. It is not even like the Suez Canal, which, though an artificial waterway, is at sea level and requires no locks. For a vessel to pass through the Panama Canal she must be lifted up eighty-odd feet above the sea into the summit

level; she then steams across the Isthmus at this level and when she reaches the other side she must be lowered down to the level of the sea again. The actual process, though simple, requires careful management. The locks are themselves, therefore, a safeguard against the use of the canal by an enemy.

It may be asked, why should we construct fortifications for the defense of the Philippine Islands and not for the defense of the Panama Canal? The answer is, that in reality fortifications are not being constructed for the defense of those islands, but rather for that of a base of supplies for our navy. The defense of those islands depends on the ability of the navy to maintain its supremacy, in time of war, over the waters of the archipelago. That requires a naval base in that region. The fortifications are to protect that naval base. The defense of the canal also requires that the navy, in time of war, shall maintain control of the waters in its vicinity, but to do it, a naval base of operations *in the canal* is not necessary.

Suppose the canal to be opened to navigation and no fortifications built to command the entrances. What will happen in case of war with some maritime nation or nations capable of crossing either ocean with a fleet strong enough to drive ours off the sea and threaten the safety of the canal? How are we to meet that emergency under the conditions assumed that we have no fortifications commanding the entrances?

It is safe to assume that our standing as a naval power will not be any lower with reference to other powers than it is to-day. The probabilities are that it will be higher by the time the canal is opened to navigation. It may, therefore, be assumed that a strong American fleet at no great distance from the Isthmus will always be available for defense. The enemy may come from different points of the compass, but he will endeavor to unite all his forces before he comes in contact with ours. He will not come from the East and the West at the same time; that would expose him to be being beaten in detail, as our forces would have a great advantage in shifting from one ocean to the other through the canal.

The first thing the attacking fleet must do is to get ours out of the way, either by destroying it or shutting it up in some harbor, or

by so severely crippling it that it will be unable to assume the offensive. A naval battle is, therefore, the first thing to be anticipated, and considerable risk will be taken by both sides in bringing it about. The enemy will seek it because it is necessary for the success of his next operation, ours will not decline it unless it is apparent that the odds are strongly against us, because, even though the enemy be not defeated, he may be so crippled that he can not continue his movement against the canal. If that battle results in the defeat of the enemy, the danger of attack is over. If, on the other hand, our fleet should be beaten, the way to the canal will be open to the enemy. Under any circumstances, it is certain that the enemy's fleet will suffer considerably in this fight even though it be victorious. It is problematic, therefore, whether he will continue his movement or not. Suppose, however, that he does continue it, what will be his next move?

The line of communications with the United States on the side on which the battle takes place will be broken, but the one on the opposite side remaining intact, reinforcements of troops would be pouring into the Canal Zone and all available naval forces on that side would assemble there. The enemy might then demand the surrender of the canal, but this would, of course, be refused. It is improbable that he will bombard the entrance. There will be little or no advantage in that; on the contrary, the rules of war, the damage to foreign shipping that would inevitably result, and the indignation of the civilized world, would forbid. Will he risk sending his ships into the canal? As only one ship could fight at a time, all advantage of preponderance of power would be lost. His fleet would not enter the canal until control of it had been secured, and in order to get control he must land troops and clear the country. These will be landed under cover of the guns of the fleet and then the struggle will be on land. As our land forces ought to be stronger than those of the enemy and our position better, the task laid out for him will not be an easy one. If the enemy should get possession of one end of the canal while our forces hold the other, it would be useless to both and could be destroyed by either.

The enemy, if strong enough, may detach a part of his fleet,

sending it around the Horn or through the Straits of Magellan to cut our communications on the opposite side of the Isthmus. With these cut, and the enemy in command of the sea on both sides, it would only be a question of time when our forces would be compelled to yield. If this movement be too dangerous or involves the loss of too much time, he may prefer to fight it out on land, advancing from the side on which a landing had been effected. To accomplish all this, however, would be a stupendous accomplishment and the danger of failure in some part which would be fatal to the whole, would cause an enemy to hesitate in undertaking it. To insure success he must come in overpowering force, which we are scarcely justified in assuming. The most powerful maritime nation would not send its entire navy on such an errand, while we might put every ship we possess into the defense.

In these supposed operations no account has been taken of the effect a few submarines would have. But that the moral effect of their presence would have a restraining influence on the enemy's operations can not be doubted.

Suppose that instead of the canal being open and undefended there are heavy guns and mortars mounted at the entrances, mines laid and some guns of light caliber to cover the mine fields. That is all that is needed or proposed to command the entrances. What part would these play in the defense? They might compel the enemy to land at some other place than at the entrance to the canal, but as there are many places nearby where a landing can be made, that would cause him no serious difficulty. If the army, without permanent fortifications, could not prevent a landing at the entrance, one with them could not prevent it from being made nearby and the fortifications would then be taken in reverse.

It will thus be seen that fortifications commanding the entrances add little or nothing to the defense under the conditions assumed, which for the United States are the worst that can be imagined. Under more favorable conditions there would be still less need for them.

To sum up, it may be stated,

First, that the canal is liable to be damaged by a few men to such an extent that a suspension of navigation is inevitable; but that fortifications commanding the entrances will afford no protection whatever from this danger.

Second, that the apprehended danger of a hostile fleet passing through the canal in time of war, if there be no fortifications, is imaginary.

Third, the danger of bombardment is imaginary. The laws of nations forbid it. But if the laws of nations be defied, the locks and other accessories are all so far inland as to be beyond the range of the guns of enemies outside.

Fourth, an attack by a combined land and naval force is unlikely, but is possible. To prevent that, every place along the coast near the canal, where a landing could be made, should be occupied. To mount guns commanding the entrances to the canal will not suffice. If an attack be made by a force sufficiently strong, and it is inconceivable that it would be made by a weak one, fortifications commanding the entrances would not save it.

Fifth, the blockade of the canal is the danger most to be feared. That can only be made effective by a naval force stronger than ours and after a battle on the sea. Great Britain is the only nation that has a naval force strong enough to blockade the canal and she has renounced the right to do so by the Hay-Pauncefote Treaty.

Sixth, when the canal is open to navigation, it will become a coaling station for commercial as well as naval vessels. Possibly docks may be constructed and both should be protected, but both the coal pile and the docks will be inland beyond the reach of an enemy's guns on the outside. It will therefore be necessary for an enemy to come inside the canal to steal the one or damage the other. This will be prevented by the naval force that will always be present.

Seventh, fortifications commanding the entrance to the canal may be supposed to afford shelter to a defeated fleet which an open and unprotected one would not. But a victorious enemy would be compelled to enter the canal in any case to get at ours, and it is not conceivable that he would do so. The canal as a last resort, could be destroyed, if necessary, to prevent its falling into his hands. Its destruction

would be no more disastrous to the United States than the loss of ability to use it.

A scrupulous regard for the obligations of treaties is an evidence of a nation's high standing in the scale of civilization, as a disregard of them is an evidence of low standing. In ancient times it was customary to exact hostages to insure the fulfilment of treaties, now the merited reproach of other nations is generally sufficient to insure their observance. The United States can not afford to place itself in antagonism to this moral sentiment, for though, sometimes, even civilized people may not be held in check by it, still it has a restraining influence, and that influence is felt more and more as nations grow older, and rise higher in the scale of civilization. There can be no doubt but that the Hay-Pauncefote Treaty was made with a view of neutralizing the canal; if it fails to accomplish that purpose there is still time to correct its defects; these should not be left until it is too late. But it is confidently claimed that the treaty does neutralize the canal, that such is the almost universal understanding, and that the construction of fortifications commanding the approaches thereto will destroy neutralization. Nothing short of the most imperious necessity would therefore justify the United States in constructing them, and no such necessity exists.

PETER C. HAINS.

THE MOST-FAVORED-NATION CLAUSE

History

The phrase "most-favored-nation" first appeared in commercial treaties toward the close of the seventeenth century. The clause in which it was used had been invented earlier in the century to meet the exigencies of that great commercial expansion which had followed upon the restless activities of the fifteenth and sixteenth centuries. The growth of international trade in the eighteenth century called for the multiplication of commercial treaties, and with the treaties the necessity for using the new clause increased.

After the American revolution, a series of treaties were made in which the clause was given an expanded and modified form. Henceforth there appear both the unqualified and the qualified forms. During the nineteenth century, while international trade became world commerce, commercial treaties became so common that they now bind the trading nations in a fine-meshed web. In these treaties the clause of the most-favored-nation was inserted with so few exceptions as to warrant its characterization as the "corner-stone of all modern commercial treaties."

Rarely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding. The experience of this clause has been no exception to the rule. All through the diplomatic correspondence of the last century there appear constant disagreements and ever-recurring irritation over what is the meaning and what are the obligations attaching to this or that clause. In view of these facts it is somewhat surprising that only recently has the clause been made the subject of special study. True, each of the more important treatises upon international law and many works upon international commerce have given it notice, while numerous articles have dealt with it briefly. The diplomatic correspondence which it has occasioned would fill many volumes. Wharton's Digest

of International Law (1887) and Moore's Digest (1906) contain excellent summaries of some of this. But no monographic study appeared until the work of Mr. Herod, which was published in 1901.

The changes in world politics which ushered in the twentieth century have vastly increased the general interest in questions which affect international, and especially commercial, relations. This widening of the political horizon has already borne fruit in the relatively immense crop of monographs which has appeared within the last decade. In this new consideration of living problems the most-favored-nation clause has begun to receive some of the attention which its importance merits.

Mr. Herod's "Most-favored-Nation Treatment" discusses the clause in general but with reference especially to the historical and legal basis for American practice. In 1902 M. Visser produced an article which furnishes a careful resumé of the history of the clause and a discussion of the chief points in the controversies to which it has given rise. Since then several German writers, especially Calwer, Kaufmann, Glier, and Shippel, have devoted very considerable attention to numerous phases of the subject. Dr. Glier's work represents an elaborate study of commercial treaties and is of particular value as an index and guide. A serious study of the history and legal aspects of the clause appears in Sig. Cavaretta's book. Certain South American writers have recently contributed to the discussion. However, with the exception of Mr. Herod's book, practically no concise treatment has appeared in English.[1]

De Martens has classified commercial treaties as containing three kinds of clauses:

[1] *Select Bibliography:* Barclay: Problems of International Diplomacy, Boston, 1907; Borchardt: Entwicklungsgeschichte der Meistbeguenstigung in Handelsvertragsystem, 1906; Cavaretta: La clausola della Nazione più Favorita, Palermo, 1906; Calwer: Die Meistbeguenstigung in Vereinigten Staaten von Nordamerika, Berlin, Berne, 1902; Glier: Die Meistbeguenstigungs-Klausel, 1905; Herod: Favored Nation Treatment, New York, 1901; Kaufmann: Welt-Zucherindustrie und Internationales und Koloniales Recht, Berlin, 1904; Lehr: La clause de la nation la plus favorisée, Rev. Droit Internat., 1893, pp. 313–316; Moore: Digest of International Law, Vol. V, 257–319, Washington, 1906; Philbert: De la liberté du commerce dans les traités de commerce, Paris, 1902; Schippel: Amerika und die Handelsvertragpolitik, 1906; Schraut: System der Handelsvertraege und der

1. Those relating to the subjects or citizens of the contracting powers in regard to their civil rights;

2. Those relating to rights reciprocally granted to the subjects in all that concerns navigation;

3. Those which concern commerce properly speaking.[2]

As the clause of the most-favored-nation covers commerce, navigation, and the rights of subjects and citizens, we may expect to find it in treaties of all these classes.

These treaties cover, of course, a wide variety of subjects. They include importation, exportation, transit, transfer, and warehousing of merchandise; customs, tariffs, navigation laws; quarantines; tolls upon water courses and canals; the stay of boats in roadsteads and docks, and the deposit of merchandise in customs warehouses; coasting trade; the admission of consuls and their rights; stipulations which govern the respective subjects of the contracting powers in the possession and transmission of personal and real property; payment and exemption from extraordinary levies and forced loans; service in the army and militia; conditions of citizenship; establishment of consuls, etc., etc.[3]

Every state has a two-fold object in its international politico-commercial arrangements: to gain and to preserve the greatest possible advantages, and to guard against present or future disadvantages and discriminations. In making treaties with this object in view, the clause of the most-favored-nation has been found one of the most convenient and effective instruments, especially for the attainment of the latter end. In substance, the clause deals with the treatment which citizens or subjects of each of the contracting powers shall receive in the territories and at the hands of the other, especially in matters of navigation and commerce. Favors in navigation and commerce extend to the articles, the agents, and the instruments of

Meistbeguenstigung, Leipsig, 1884; Visser: La clause de la nation la plus favorisée, Rev. Droit Internat., 1902, pp. 66–87, 159–177, 270–280; Von Melle: Die Meistbeguenstigungsklausel, In Holtzendorff's Handbuch der Voelkerrecht, III, pp. 204–214 and ff, Berlin, 1889; Great Britain, Parl. Papers, Commercial, [No. 9. (1903).]; U. S. Treaties in Force 1904, Washington, 1904.

[2] De Martens: Droit international, Tome II, pp. 314–315.

[3] Calvo: Droit international, III, 1597.

commerce. The object sought is uniform treatment without discrimination.[4]

In the simplest form of the clause the contracting parties agree that in all that respects commerce and navigation, any privilege, favor, or immunity which either grants to a third state shall be granted to the other.

The shortest way by which to arrive at an understanding of the position of the clause in modern treaties is to go to its origin and to trace it in its evolution, that is, to study it historically. Two inevitable conclusions will be derived from such a course. To state these in advance will greatly simplify the demonstration. In the first place, the clause had a two-fold origin, and usually the two-fold object suggested above — it was at once a political and an economic instrument. In the second place, two leading schools of interpretation have grown up, the one demanding a strict, or literal, interpretation of the words of the clause, the other insisting upon a practical, and more political, interpretation. Of the leading exponents of these radically different interpretations, the nation which holds to the former, Great Britain, is at the same time the greatest exponent of the principles of free trade; while the nation which insists upon the latter, the United States, is the foremost advocate of the theory and practice of protection.

Most writers on international law, inferring from the fact that in its practical development the clause of the most-favored-nation has been most frequently applied as a regulator of commercial relations, affirm that it owes its origin to a movement eminently economic. Sig. Cavaretta points out, however, that in its first appearance, it was due to political rather than economic exigencies, although these were of course closely allied with elements of an economic character. He discovers the embryo of the clause in the treaty of November 8, 1226, in which the Emperor Frederick II conceded to the city of Marseilles the privileges previously granted to the citizens of Pisa

[4] "It is clearly evident that the object sought in all — is equality of international treatment, protection against the wilfull preference of the commercial interests of one nation over another." — Mr. Sherman's note to Mr. Buchanan, Jan. 11, 1898. Moore, *op. cit.*, Vol. V, p. 278.

and those of Genoa. These concessions were dictated by political motives.[5]

Although the practice of granting reciprocal favors and the theory of favored nations had existed much earlier than this treaty, and although this example was followed with modifications during succeeding centuries, it is not until the seventeenth century that the real clause of "the most-favored-nation" makes its appearance in written treaties.[6]

Previous to this time the number of nations engaged in international commerce, as regulated by treaties, was small. Trade was really carried on by the adventurous few, and was, as a rule, either sporadic or governed by monopolies. As world commerce increased in the fifteenth and sixteenth centuries, as England and Holland set themselves to compete with Spain and Portugal, and the French and Scandinavians commenced to dispute the supremacy of the Hanseatic League and the waning power of the Italian Republics, conditions were changed. Treaties became necessary and frequent. In order to avoid repetition, a clause was framed which should refer back, embrace the conditions of the treaties already existing, and extend their provisions to the newly contracting states. This clause was that of the "most-favored-nation."

Not only did this clause generalize previous provisions, it performed a more important function, namely, to safeguard the state in whose treaties it appeared against future discriminations. This made it at once of great importance. Thus M. Visser finds the principal cause for its extensive use in the economic necessity which forced each state, in the clash of international commercial competition, to guard against falling into a position of disadvantage.[7]

In the beginning, this extension of favors was made but to one or two specified states. For instance, in the agreement, July 6, 1612, between the United Provinces and the Porte, the former secured the same advantages which had already been granted to Great Britain

[5] Cavaretta, *op. cit.*, 59.

[6] For a detailed study of analogies to the clause in early times, and of its historical development, compare Cavaretta, *op. cit.*, pp. 12–61.

[7] Visser, *op. cit.*, 78.

and France. The next step was to extend the advantages to include such favors as should be granted to certain other specified nations; then to include advantages granted to *any nation whatsoever*. Thus article 4 of the treaty between Great Britain and Portugal, January 29, 1642, specifies that subjects of Great Britain shall enjoy all the immunities accorded the "subjects of any nation whatsoever in league with the Portugals." This treaty is regarded as marking a turning point in the economic and political fortunes of both nations. The treaty of February 13, 1661 between Great Britain and Denmark contains the words (article 11) "people of any foreign nation whatsoever."[8] The Anglo-Danish Treaty of November 29, 1669 contained the phrase "whatsoever foreign nations." A treaty in September, 1675, between Great Britain and the Porte extends the favors of this grant to "whatsoever other Christian Nation," (article 3); while that of August 16, 1692, between Denmark and the Hanse cities, contains the phrase "most-favored-nation," (article 6).

In the eighteenth century, the treaty of commerce became of great importance, and with it the importance and the frequency of the appearance of the clause increased.[9] The regime of the monopoly and of the mercantile system gave rise to reciprocal commercial arrangements between nations, and the gradual opening of world commerce. The success of the American Revolution was of the greatest importance in all that relates to commerce. Soon after the Declaration of Independence the United States began making treaties with European nations. In nearly all the treaties which were then and subsequently made by the United States, the clause of the most-favored-nation was inserted, but in a form which, for the first time, provided that the advantages to be accorded were to be in return for an *equivalent*. The treaty with France, February 6, 1778, contains the first example of this new development. There in article 2, it is agreed that the favors which either of the con-

[8] *Cf.* Treaty between Portugal and the United Provinces, August 6, 1661.

[9] See Treaties, England–Portugal, Dec. 27, 1703; England–Spain, Dec. 9, 1713; England–Spain, Dec. 14, 1715; England–Spain, Oct. 5, 1750; England–Sweden, Feb. 5, 1766; Prussia–Saxony, June 18, 1766; England–Russia, June 20, 1766; Portugal–Denmark, Sept. 26, 1766.

tracting parties shall grant to any other shall be immediately extended to the other "freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional." [10] Treaties with Sweden, April 3, 1783, and Prussia, September 10, 1785, contain similar stipulations. With the making of these treaties, there begins the development of the so-called "American interpretation."

The clause now enters upon a third phase, that in which it is used as an instrument to regulate the multiplex counter-rights of the subjects of the contracting parties.[11] During the nineteenth century, the use of the clause increased and became so common, in one or another of its various forms, that its appearance came to be looked upon almost as a matter of course. Schmoller has characterized the clause as the "volkerrechtlichen Eckspfeiler aller neueren Handelsvertraege." The clause was regularly inserted in the treaties of the Zollverein. It was a regular feature in the treaties fashioned under the new commercial policy of Napolean III. It forms the basis of the present commercial relations of France and Germany. It appears in most of the commercial treaties of the United States and Great Britain. It is prevalent in that large group of European treaties which were made in the last ten years of the century. The German treaties contain it in practically absolute form. France holds to it as far as possible in spite of her adoption of the double tariff.[12] Spain developed an elaborate commercial policy, meaning to rid herself of the cramping restrictions of the clause, but in practice she has succeeded only to a very limited extent in effecting this exclusion.[13] Portugal, with a similar policy, has succeeded in making very few treaties without this clause. Switzerland has opposed the clause but has continued to use it. It occurs regularly in the new Japanese treaties and in recent

[10] In making this treaty, it may be observed, France was considering her political even more than her economic interests.

[11] *Cf.* Cavaretta, *op. cit.*, 50 ff.

[12] *Cf.* Visser, *op. cit.*, 72–74.

[13] In a treaty with Japan, Jan. 2, 1897, art. 14, Spain accords Japan most-favored-nation treatment as regards customs duties; and Nov. 13, 1899, the products of Holland were accorded by Spain the most-favored-nation treatment.

Chinese treaties, having in several of each a very wide extension. Some South and Central American states have abrogated their commercial treaties with the object of getting rid of the clause in its unlimited form. Chile, Costa Rica, Dominica, Guatemala, and Uruguay denounced their commercial treaties with European countries, thinking these treaties an obstacle to their project of forming a customs-union, but Argentina and Paraguay have accepted and retained the most-favored-nation clause.[14] We may conclude that as commercial treaties exist to-day, they generally contain this clause in some form, and that attempts to get rid of it have not been conspicuously successful.[15]

It may perhaps be said that a fourth phase in the history of the clause has begun with the rise of the system of double tariffs. The French system of double tariffs was introduced with the affirmed object of freeing the legislature from the checks imposed by the régime of treaties of commerce.[16] Spain, Russia, Germany, and Norway, and, in America, Brazil and Argentina have to some extent imitated the French in the use of this system. What effect this new development has had or may have upon the clause of the most-favored-nation will remain to be dealt with in a further chapter.

In order to simplify the study of the clause as it appears in many treaties, we may first consider the limitations within which it operates and the general forms in which it occurs. It is not intended that the clause shall operate so as to affect the internal policy of the state; it applies solely to treatment of foreign states, that is, to the relative treatment of the citizens and the commerce of foreign states.

[14] *Cf.* Treaties, Argentina–Italy, June 1, 1894; Argentina–Norway and Sweden, July 17, 1885; Paraguay–Italy, Aug. 22, 1893; Paraguay–Belgium, Feb. 15, 1894.

[15] "On peut donc dire que les traités de commerce se basent en général sur le traitement de la nation la plus favorisée. Presque tous les traités contiennent une clause garantissant ce traitement d'une manière plus ou moins étendue, et le petit nombre d'États qui ont essayé de s'y soustraire n'y ont réussi que fort peu. Il s'entend que les exceptions faites en ce qui concerne le commerce frontière, les relations avec les États avoisinants ou la faculté de conclure une union douanière n'enfreignent pas le principe d'une manière importante. Ces réserves ne présentent que peu d'intérêt ou sont expliquées par les nécessités du voisinage." (Visser, *op. cit.*, 77.)

[16] Cavaretta, *op. cit.*, 53.

It is not usually considered as comprehending special arrangements and reciprocity between nations, where on account of proximity or special circumstances, reason exists for relations which cannot be shared by the world at large.[17] Special relations between a colony and the mother country are generally understood to be exempt from the operation of the clause. The term "most-favored-nation" is sometimes replaced by "most-favored-foreign-nation," though even where not so specified, that meaning is understood, as the contracting parties do not mean, for the purpose of the clause, that reciprocal relations between themselves and their colonies shall be considered as standards for most-favored-nation treatment.

With these exceptions, the scope of the clause appears to be limited only by its wording and the interpretation put upon that wording. The clause sometimes stipulates that whatever advantages are accorded by either contracting party to a third state shall extend to the other; sometimes, that this shall be so without equivalent; sometimes forbids putting obstacles to the commerce of one which are not extended to the commerce of other nations. In some clauses there exists a limitation including or excluding certain nations; again the advantages are specified or limited; sometimes the articles which are to enjoy special treatment are enumerated.

An analysis and arrangement of the forms in which the clause occurs leads to the following classification.[18]

Form 1. The *form of simple transfer,* which grants a privilege without reciprocity or condition. This often appears as a unilateral provision, especially in treaties between Christian or highly-civilized and non-Christian or semi-civilized, states, whereby the favors are extended to the former without reciprocity. In this form,

One state grants to the other all the privileges granted to any other.[19]

[17] *Cf.* Herod, *op. cit.*, 112–115; Visser, *op. cit.*, 162. Treaty between Great Britain and Uruguay, July 15, 1899; treaty between United States and Ecuador, June 13, 1839; treaty between Holland and Portugal, July 5, 1894.

[18] *Cf.* classification by Herod, *op. cit.*, pp. 5–7; and Cavaretta, *op. cit.*, pp. 8–9.

[19] In the treaty between Japan and Great Britain, Oct. 14, 1854, article V provides: "In the ports of Japan either now open or which may hereafter be opened to the ships or subjects of any foreign nation, British ships and subjects shall be entitled to admission and to the enjoyment of an equality of advantages with those

Form 2. The *specialized reciprocal form,* which applies only to favors mentioned in the treaty. For instance,

No other or higher duties shall be imposed by either of the high contracting parties on the importation of any article, the growth, produce or manufacture of the other, than are or shall be payable on the like articles, being the growth, produce or manufacture of the most-favored-nation.[20]

Form 3. The *simple reciprocal form.*

The high contracting parties agree that, in all that concerns commerce and navigation, favors which either has granted or may hereafter grant to any other state shall be granted to the other party.

This includes the majority of British treaties.[21]

of the most-favored nation, always excepting the advantages accruing to the Dutch and Chinese from the existing relations with Japan." In the treaty between China and the United States, Oct. 8, 1903, article III provides that citizens of the United States in the open or hereafter opened ports of China "shall generally enjoy as to their persons and property all such rights, privileges, and immunities, as are or may hereafter be granted to the subjects or citizens of the nation the most favored in these respects."

[20] Treaty between China and United States, July 28, 1868, article 6, specifies for most-favored-nation privileges as regards *travel* and *residence.* In the treaty between France and Italy, Nov. 3, 1881, article 17 provides that each contracting party engages to allow the other to profit by any privilege or lowering of the tariff duties on the *importation* or *exportation* of articles, whether mentioned or not in the treaty, which one of them has accorded or shall accord to a third power. (The terms of the treaty not to apply to articles which are the objects of state monopoly.) Treaties between France and Honduras, Feb. 11, 1902; France and the Dutch Colonies, Aug. 13, 1902; and France and Nicaragua, Jan. 27, 1902, provide for most-favored-nation treatment as regards duties on importation and exportation of specified articles. The form adopted in the treaty between Great Britain and Uruguay, July 15, 1899, specifically restricts the application. "The stipulations contained in the treaty * * * do not include cases in which the Government of * * * Uruguay may accord special favors, exemptions, and privileges to the citizens or the productions of the United States of Brazil, or of the Argentine Republic, or of Paraguay in matters of commerce. Such favors cannot be claimed in behalf of Great Britain on the ground of the most-favored-nation rights as long as they are not conceded to other states." See treaties between United States and Great Britain, Nov. 19, 1794, article 15; Holland and Spain, July 12, 1892, articles 2, 6; Holland and Italy, Nov. 24, 1863, article 2; Holland and Austria-Hungary, March 26, 1867, article 2.

[21] In the treaty between Great Britain and Servia, June 28–July 10, 1893, articles I, II provide: "The two contracting parties engage reciprocally not to accord to subjects of any other power in matters of navigation or commerce any

Form 4. The *imperative or unconditional form.*

The high contracting parties agree that all favors, etc., in all that concerns commerce and navigation which either has already granted or may hereafter grant to any other state, shall immediately and without condition become common to the other party.[22]

Form 5. The *qualified, or conditional, reciprocal form.*

The high contracting parties agree that in all that concerns navigation and commerce, favors which either has already granted or may hereafter grant to any other state shall become common to the other party *who shall enjoy the same freely if the concession is freely made, or upon allowing the same compensation if the concession was conditional.*

This form appears in most of the treaties of the United States. It also appears in nearly all Japanese treaties, and is followed by

privilege, favor, or immunity, whatever, without extending them during the duration of the said concessions to the commerce and navigation of the other party, and they will enjoy reciprocally all the privileges, immunities, and favors which have been or shall be conceded to any other nation." In that between Japan and China, July 21, 1896, article 4 grants, "in all respects the same privileges and immunities as are now or may hereafter be granted to the subjects or citizens of the most-favored nation." A convention between Austria-Hungary and Mexico, Sept. 17, 1901, grants "Most-favored-nation treatment not only as regards importation, exportation, transit and in general everything relating to commercial operations and to navigation, but also in carrying on of business and of manufactures and the payment of taxes in connection with them." *Cf.* Treaties between United States and Great Britain, July 3, 1815; Great Britain and Netherlands, Oct. 27, 1837, article I; Russia and Great Britain, Jan. 12, 1859, article X; France and Mexico, Nov. 27, 1886, article II; Germany and France, May 10, 1871, article XI; Servia and Greece, June 17, 1894; Roumania and Bulgaria, March 4, 1895; Belgian Treaties with Denmark, Greece, and Sweden, 1895; and English Treaties cited *infra.*

[22] The treaty between Germany and Austria-Hungary, Dec. 6, 1891, as amended and completed Jan. 25, 1905, provides that no more favorable conditions in respect of import, export, or transit duties shall be granted by either contracting party to a third power than shall be accorded to the other party, and that any concession of this kind made to the third power shall *at once* be applied to the other. Any dispute relating to these provisions to be referred to arbitration (article 23*a*). In the treaty between Great Britain and France, Feb. 28, 1882, it is provided that "* * * with the exception above stated each * * * engages to give the other immediately and unconditionally the benefit of every favor, immunity, or privilege in matters of commerce or industry which has been or may be conceded by one * * * to any third nation, whatsoever, whether within or beyond Europe." *Cf.* treaties between Great Britain and Italy, June 15, 1883, article 11; Russia and Denmark, Mar. 2, 1895, article I.

certain South American states. The modifying or conditional clause "freely if — freely made," etc., contains the principle which the United States secretaries have consistently claimed shall govern the interpretation of the clause whether included or not.[23]

That Great Britain and the United States follow forms outlined in the third and fifth classes respectively is significant of their respective attitudes as concerns the intention and the proper interpretation of the clause. It may be laid down that, in general, throughout Europe the clause has been treated as applying to all reductions of tariff without distinction. The United States on the other hand, and such nations as have followed its interpretation, have consistently distinguished between reductions of a general character or those made gratuitously, and those made specifically in return for reductions or an equivalent granted by the other state.[24] The central feature in the practice of the United States has been the principle of reciprocity. As has already been pointed out, the special limiting clause which expresses the American idea and forms the basis of the American interpretation was first inserted in treaties made by the United States. A survey of American commercial treaties shows that the United States has regularly adhered to this principle. The limiting clause has been omitted in a few cases,[25] and one or two cases of irregular interpretation have occurred.[26]

[23] Treaty between United States and Japan, Nov. 22, 1894, article XIV provides: "The contracting parties agree that in all that concerns commerce and navigation, any privilege, favor, or immunity which either has actually granted or may hereafter grant to * * * any other state shall be extended to * * * the other high contracting party *gratuitously if the concession in favor of that other state shall have been gratuitous, and upon the same or equivalent conditions if the concession shall have been conditional; it being their intention,*" etc. *Cf.* treaties between Argentine Confederation and Prussia, Sept. 19, 1857, article III; and Argentine Confederation and Japan, Feb. 3, 1898, article IV. For complete list of U. S. treaties containing this form, 1778–1887, *cf.* Herod, *op. cit.*, 13, note. *Cf.* treaties between Portugal–Prussia, Feb. 20, 1844, article XII; England–Liberia, Nov. 21, 1848; Zoll-Verein–Netherlands, Dec. 31, 1851, article XXXIII; Holland–Liberia, Dec. 30, 1862, article XI; North Germany–Liberia, Oct. 31, 1867, article VI; and modern Japanese treaties.

[24] *Cf.* Barclay: Problems of International Diplomacy, 137.

[25] Treaties between United States and Great Britain, July 3, 1815; United States and Switzerland, Nov. 25, 1850.

[26] *Cf. infra*, p. 410.

American diplomatists have, however, with remarkable unanimity, maintained that in spite of the most-favored-nation clause, and even though the clause itself may not contain an express stipulation to that effect, a nation may always require an equivalent for concessions demanded under the operation of the clause.

> You will doubtless have understood that where the words "qualified" and "unqualified" are * * * applied to the most-favored-nation treatment, they are used merely as a convenient distinction between the two forms [which] such a clause generally assumes in treaties, one containing the proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equivalent if conditional — the other not so amplified. This proviso, when it occurs, is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity, or mutually reserved interest as between the contracting parties. This ground has been long and consistently maintained by the United States.[27]

The United States first had occasion to define its position expressly and to defend it vigorously in the controversy which arose over the provisions of the treaty of April 30, 1803, with France, article VIII of which provides:

> In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most-favored-nation in the ports above mentioned.[28]

When, subsequently, under the operation of the reciprocal agreement between the United States and Great Britain, July 3, 1815, the ships of the latter enjoyed a national treatment in the harbors of the United States, which was not allowed to the ships of France, the French government, while refusing to grant an equivalent to the United States, demanded the same treatment which was accorded to England, insisting upon the literal interpretation of the most-favored-nation clause, contending that "a clause which is absolute and unconditional can not be subject to limitation or any modification whatever." The United States government emphasized the

[27] Mr. Bayard to Mr. Hubbard, July 17, 1886, MS. Inst. Japan, III, 425, Moore, *op. cit.*, V, 273. *Cf.* Whitney *v.* Robertson, (1888) 124 U. S. 190.

[28] Moore, *op. cit.*, V, 257–260. American State Papers, F. R., Vol. V.

equivalent. The French replied that France had given an equivalent at the time of the cession of Louisiana. The United States argued for a more specific equivalent, saying that if they were to give France *freely* that for which England had paid, France would be enjoying a treatment more favored that that of the most-favored-nation. This was the position held by Mr. Adams, President Monroe, and Mr. Gallatin, whose notes have been repeatedly quoted by United States Secretaries.

> But the allowance of the same privileges * * * to a nation which makes no compensation, that have been conceded to another nation for compensation, instead of maintaining destroys that equality * * * which the most-favored-nation clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price.[29]

To M. Visser, this argument appears beside the point. He fails, however, to show conclusively just how it is so. Although it is true that "if, on examination, it appears that the third nation possesses a certain favored treatment, it matters little to others in what manner the third has obtained it,"[30] this does not make a breach in the soundness of the general contention of the United States. The whole difference may finally be sifted down to a distinction between the two views as to what constitutes "a favor."[31] It is this difference of opinion which causes M. Visser to characterize the American argument as a "jeu de mots."[32]

In 1821, Monroe worded our doctrine clearly in his message to Congress. In 1823, Mr. Gallatin stated expressly that the omission of the limiting clause made no difference and that where it was inserted it was merely explanatory and inserted "out of abundant caution." This was again stated by Mr. Livingston in 1832.

The treaty of the United States with Colombia, Oct. 3, 1824, provided that advantages given by either nation to a third party should be extended to the co-contractant, "freely if the concession was freely made," upon "compensation if the concession was con-

[29] Mr. Sherman to Mr. Buchanan, Jan. 11, 1898, Moore, *op. cit.*, V, 278.
[30] Visser, *op. cit.*, 273.
[31] *Cf.* Barclay, *op. cit.*, 138 ff.
[32] *Cf.* Visser, *op. cit.*, 273, and Cavaretta, *op. cit.*, 99.

ditional." Later the United States claimed the right to certain advantages which Central America was enjoying under a treaty with Colombia. When the Colombian government pointed out that its treaty with Central America was made upon a reciprocal basis, the United States conceded that its claim was unwarranted, and proceeded to arrange to grant to Colombia an equivalent for the advantages which were demanded.[33]

The treaty of May 1, 1828, between the United States and Prussia, under the provisions of which Germany has made repeated claims against the United States, contained ten articles on the subject of reciprocal commercial relations. Article 9 specifies that any favor granted to a third nation by either of the contracting powers shall immediately become common to the other, but adds the conditional clause. A simple illustration of the rights which Germany has claimed by virtue of this most-favored-nation clause is that made in 1894, that German salt should be allowed to enter ports of the United States, duty free. At the same time American salt was subject to duty in the ports of Germany. Secretary Olney answered that the position of the German government was absolutely untenable; that the principle the United States has regularly maintained was that of reciprocity; and that this position had already been acquiesced in by both Germany and Great Britain.[34]

When Austria, under the treaty of August 27, 1829, claimed that her wines should enter the United States at the same rate as did the French wines under the treaty of 1831, the United States government pointed out the difference between favors freely granted and reciprocal advantages, and at the same time suggested that no nation intends to bind itself by a condition which will render it unable to make further treaties, a fair interpretation of the most-favored-nation clause being, that, "if the duties were lessened in favor of any other nation, the contracting parties should obtain a like reduction for the same equivalent."[35] The United States has carefully avoided placing itself in a position where its liberty as

[33] Moore, *op. cit.*, V, 260.
[34] *Cf. infra*, pp. 412, 414.
[35] Moore, *op. cit.*, V, 261.

regards future negotiation will be restricted or where other nations shall enjoy privileges in trading with us which we do not enjoy in return.[36]

After the conclusion of the reciprocity treaty of the United States with France, May 28, 1898, the Swiss demanded for Swiss imports into the United States the same concessions made to France. Their claim was based upon the treaty between the United States and Switzerland of November 25, 1850, which provided reciprocal most-favored-nation treatment in all that relates to importation, exportation, and transit, and that no favors in commerce should be granted by either to a third nation which should not immediately be enjoyed by the other, etc. It was shown that there was no conditional clause in this treaty and that by the understanding between the negotiators Switzerland had been given a "full and unlimited guarantee of the fullest most-favored-nation treatment." The United States government, having examined the original correspondence, declared that "both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect," although this formed an exception to the otherwise uniform policy of the United States. The customs officers were instructed to extend to imports from Switzerland the same rates imposed upon similar French goods under the recent agreement. Germany and other states soon claimed the same treatment. On March 23, 1899 the United States gave notice of its intention to stop the operation of the articles in question in the Swiss Treaty and they ceased to have effect March 23, 1900.[37]

The position of the United States both as regards the regular interpretation and that for extraordinary cases was thoroughly set forth in the diplomatic correspondence which followed the making of the treaty with Hawaii, January 30, 1875. In this, a treaty of strict reciprocity and unusual favors, it was stipulated that, in consideration of very material advantages in return, each country

[36] *Cf.* Mr. Fish's refusal to make a treaty with Argentine for a fixed scale of duties, 1869, Moore, *op. cit.*, V, 262; the action of the United States when unexpected consequences followed the making of the treaty with Belgium (*Ib.* 262).

[37] Moore, *op. cit.*, V, 285.

would admit certain articles from the other, duty free (articles I and II), and that no other nation should have the same privilege in Hawaii as the United States, nor would Hawaii make treaties with any giving them such (article IV). The English government protested.[38] England had an agreement with Hawaii (Treaty, July 10, 1851), that neither country would charge higher duties upon articles from the other than upon the same articles from any third nation. It has been usual for United States diplomats, to say that, as between two states which have a most-favored-nation treaty, each may demand and secure favors given by the other to a third, providing it, the second, will grant to the first concessions equivalent to those granted by the third.[39] But under the provisions of this treaty, Hawaii was unable to extend even this right to England, so it appears that in order for her to keep her treaty obligations with the United States it was necessary for her to break her promise to England and to establish an effective discrimination against English and other goods. From this fact it might seem that M. Visser's suggestion, that the action of the United States in this case was not in agreement with the doctrine which it maintains, is correct. But the case was an exceptional one. Not only did the United States hold that "the concession of these privileges to the United States can not form the basis for a claim to like priveleges under the parity clause of the ordinary form of treaty, as such special privileges were given in return for special valuable considerations," but it considered this as, for geographical and political reasons, a special and extraordinary case. This view was certainly justified, and it was soon so recognized by Great Britain. In the arrangements between Hawaii and Germany, 1878, it was specified that the special advantages granted to the United States should not be invoked as a precedent for treatment of Germany.[40] The Hawaiian case was held exceptional in a very clearly worded

[38] Sweden, Belgium, and Holland also protested under treaties of July 1, 1852, Oct. 4, 1862, and Oct. 16, 1862, respectively.

[39] *Cf.* Mr. Freylinghuysen's note to Mr. Bingham, Minister to Japan, June 11, 1884, Moore, *op. cit.*, V, 267–268. *Cf.* Herod, *op. cit.*, 113–114.

[40] See Foreign Relations U. S., 1878, 382–383, 403, 405.

decision in the United States Supreme Court, in 1887.[41] In this case brought by Denmark, relying upon the most-favored-nation clause in her treaty of April 26, 1826, the Supreme Court held:

> These stipulations * * * do not cover concessions like these made to the Hawaiian Islands for valuable considerations. They were pledges * * * that there should be no discrimination * * * in favor of goods of like character imported from other countries. * * * They were not intended to interfere with special arrangements with other countries founded upon a concession or special privileges.[42]

In this connection it is interesting to turn to the treaty between the United States and Tonga, Oct. 2, 1886. In article II, after stipulating for most-favored-nation treatment, appears the following clause:

> it being understood that the Parties hereto affirm the principle of the law of nations that no privilege granted for an equivalent or on account of propinquity or other special considerations comes under the stipulations herein contained as to the most-favored-nations.

This was doubtless inserted on account of the claims of England under the Hawaiian treaty.[43]

The following case suggests a decided inconsistency on the part of the United States. In the treaty between United States and Prussia, 1828, referred to above, article 5 reads: "No higher or other duties shall be imposed on the importation into" either of any article the produce or manufacture of the other "than are or shall be payable on the like article being the produce or manufacture of any other foreign country * * * ." Article 9 reads: "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted * * * or on yielding the same compensation, when the grant is conditional." To Germany's contention — in agreement with her own as well as the general diplomatic practice of Europe, — that article 5 is the regulating factor, the United States has repeatedly

[41] Bartram *v.* Robertson, 1887, 122 U. S. 116.

[42] See also U. S. Foreign Relations, 1881, 622 ff; and Herod, *op. cit.*, 116 ff.

[43] Snow: American Diplomacy, 176. Contrast with this the treaty between Great Britain and Tonga, Nov. 29, 1879, art. 2.

answered that the conditions of article 9 have a modifying effect on article 5 and that only in return for an equivalent can concessions granted a third nation on a reciprocal basis be granted to the second. Now in a treaty between the United States and Hayti, November 3, 1864, article 2 provided that favors in commerce and navigation which either had granted or should grant to a third party should extend "in identity of cases and circumstances" to the other; "gratuitously if * * * gratuitous; or * * * for compensation if * * * conditional." Article 10 provided: "* * * no higher or other duties upon the tonnage or cargo of the vessels" of one shall be levied in the ports of the other than are levied or collected on the vessels of the most-favored-nation. July 31, 1900, Hayti made a treaty with France which was evidently reciprocal in its nature, France granting Hayti certain privileges in return for which Hayti reduced the tonnage dues paid by French sailing vessels and the dues on merchandise landed from them, if of French origin. The United States government at once demanded the same rights for American vessels under article 10 of the treaty of 1864. The Haytian government invoked the application of article 2. The United States government answered that "Article 10 is quite independent of article 2, and creates absolute rights which this government can not fail to insist upon." The correspondence on the subject indicates that the American foreign office was very much out of patience with Hayti, and their communications, unfortunately, do not indicate the line of argument by which they maintain this position.[44] Unless some special significance can be attached to the phrase "in identity of cases and circumstances" in article 2, or unless the United States can point out some particular circumstance whereby the grant made by Hayti to France is "freely made" rather than a return for compensation, it is difficult to arrive at any other conclusion than that this forms an arbitrary exception to the practice of the United States.

Another case in which the action of the United States appears open to criticism is that of the treatment accorded to Colombia under the Act of October 1, 1890. This Act admitted certain articles

[44] U. S. Foreign Relations, 1901, 278–279.

to the United States duty free, but allowed the President, if he considered the duties of any country reciprocally unequal, to suspend the free list upon goods of such country. After the failure of attempts to negotiate a reciprocity treaty with Colombia, the President, March 15, 1892, suspended the free list on certain products of Colombia. At the same time similar goods of Mexico and Argentine were gratitously enjoying these favors. Colombia, relying upon her favored-nation clause, protested. To the insistent and fiery notes of the Colombian Minister, the United States Foreign Office replied in a lengthy correspondence which contains excellent suggestions as to diplomatic "good-form," but fails apparently to answer the logic of the Colombians or to analyze to any extent the justice of their demands.

At the same time, the practice of other nations presents isolated instances of inconsistencies, though in no case are these sufficient to disestablish the regularity of their interpretations. In Germany in 1885, under the guidance of Bismarck, who asserted that the relations of Germany and the United States were on the basis of the most-favored-nation, the Bundesrat, in an ordinance granting to the most-favored-nations the lower duties granted to imports of rye from Spain, expressly included the United States; but in 1883, in a similar ordinance extending to most-favored-nations certain concessions recently granted to Spain and Italy, the United States had not been included. In 1891, Germany negotiated a series of treaties with European countries for reciprocal reductions of import duties. To be consistent with the principle advocated in 1885, they should have extended the reduced duties granted to various European countries to the United States. This they did not do. The Saratoga Convention of August 22, 1891, was based on reciprocity and was, in character, a bargain in return for concessions.[45]

Certain inconsistencies in English practice will be treated under the subject of countervailing duties.

Among modern European treaties which contain the clause, none is more often quoted than the Frankfort treaty between Germany and France, May 10, 1871. In it we find (article 11):

[45] See Stone: Most-favored-nation relations between Germany and the United States, N. Am. Rev., 182 (1906), pp. 433–445.

The French and German governments will base their commercial relations upon the system of reciprocal treatment on the footing of the most-favored-nation. * * * This rule shall apply * * * to favors which either has granted or shall grant to States other than the following: England, Belgium, Holland, Switzerland, Austria and Russia * * * .

It is claimed that the operation of this treaty has always been to give to each contracting party every advantage which was or has been granted by the other to a third nation (with the exception of the States mentioned).[46]

The Treaty of Commerce between Germany and Austria-Hungary, December 6, 1891, amended January 25, 1905, provides that no more favorable conditions in respect of "importation, exportation, and transit duties" shall be granted by either party to a third power than shall be accorded to the other party; that any concessions of this kind shall at once apply to the other; and that any disputes arising over this provision shall be submitted to arbitration.

Two treaties of special interest on account of their comprehensiveness are the following:

The treaty between Greece and Japan, May 20–June 1, 1899, stipulates for reciprocal most-favored-nation treatment as regards, (article II) diplomatic and consular officers, (article III) commerce, navigation, residence, hiring residences and warehouses, trading, all that concerns the acquisition, enjoyment and disposition of property of all kinds, (article IV) travel, commerce, navigation, (article V) export and import duties and prohibitions, transit, warehousing, bounties, drawbacks, (article VII) tonnage, light and harbor dues, pilotage, quarantine, salvage in case of damages, (article XIII) billeting, compulsory military service, contributions of war, military exactions, and forced loans. The coasting-trade is excepted (article VIII).

The treaty between China and Mexico, December 14, 1899, while a little less complete than the above, is nearly as comprehensive and includes also (article IX) ships of war; it also provides (article XI) that if either country shall open its coasting trade, wholly or

[46] Visser, *op. cit.*, 83–84.

in part, to any nation or nations, the other party shall have the right to claim the same concessions or favors, "provided said contracting party is willing, on its part, to grant reciprocity in all its claims on this point." There is also a provision that the treaty shall remain in force ten years.[47]

Several modern treaties specify that citizens of each nation in the dominion of the other shall enjoy absolute religious freedom and the same legal privileges as native subjects.

An excellent example of the imperative and unconditional form appears in the treaty between Germany and Russia, January 29, 1894, July 15, 1904, article 6:

> The products of the soil and industry of [each, when imported into the other] destined for consumption, warehouse, re-exporting, or transit, will be treated in the same manner as the products of the most favored nation. In no case, and on no account will they be liable to duties, charges, taxes, or dues higher or other, nor be subjected to surtaxes or to exclusion from importation by which the similar products of any other country are not affected. *Especially any favor and facility, any immunity, and any reduction of the customs dues contained in the German tariff or in the treaty tariffs which one of the contracting parties may give to a third power permanently or temporarily, gratuitously or for compensation, will immediately and without conditions, reservations, or compensation be extended to the products of the soil and industry of the other.*

England has been as consistent in maintaining that the clause is absolute as the United States that it is not. In 1884, Mr. Freylinghuysen said of the English position: "The English contention has hitherto been, under the most-favored-nation clause, * * * that it is absolute, and that even when Japan may bargain with any power to give it a favor for an equivalent the favor must be granted to England without equivalent. The Japanese contention is the reverse of this * * *" *i. e.*, in agreement with that of the United States.[48] In 1885, Earl Granville wrote:

> From this [the American] interpretation, Her Majesty's government entirely and emphatically dissent. The most-favored-nation clause has now become the most valuable part of the system of commercial treaties,

[47] *Cf.* also treaty between United States and Japan, November 22, 1894.

[48] Mr. Freylinghuysen to Mr. Bingham, June 11, 1884, MS. Inst. Japan, III, 1253, Moore, *op. cit.*, V, 267.

and exists between almost all the nations of the earth. It leads more than any other stipulation to simplicity of tariffs and to ever-increased freedom of trade; while the system now proposed would lead countries to seek exclusive markets and would thus fetter instead of liberating trade. It is moreover obvious that the interpretation now put forward [just that which the United States has *always* put forward] would nullify the most-favored-nation clause; for any country, say France, though bound by the most-favored-nation clause in her treaty with Belgium, might make treaties with any other country involving reductions of duties on both sides, and, by merely inserting the statement that these were granted reciprocally and for a consideration, might yet refuse to grant them to Belgium unless the latter granted what France might consider an equivalent. Such a system would press most hardly on those nations which have already reformed their tariffs and have not equivalent concessions to offer, and therefore Great Britain, which has reformed her tariff, is most deeply interested in resisting it.[49]

This last sentence contains within the compass of its few words the key to the English position and the explanation of the English interpretation.

The English treaties have been true to these principles, but not without exception. In the treaty with Liberia of November 21, 1848, we find the following stipulation (article 7):

> It is hereby agreed between them that any favor, privilege, or immunity whatever, in matters of commerce and navigation which either * * * has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other * * * gratuitously, if the concession in favor of that other state shall have been gratuitous, or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

English treaties have been, however, as a rule, both in wording and in interpretation, unmodified. The purport of their most-favored-nation provision is in general, that "in all matters and regulations of trade and navigation, each of the high contracting parties will treat the other upon the footing of the most-favored-nation."[50]

[49] Earl Granville to Mr. West, Feb. 12, 1885, Blue Book, Commercial, No. 4 (1885), 21–22, Moore, *op. cit.*, V, 270–271.

[50] Treaty between Great Britain and Sweden and Norway, March 18, 1826, art. 9. In the treaty between England and France, Jan. 26, 1826, art. 4

A favorite form of the clause in English treaties, found constantly recurring, often in identical form, sometimes with slight variations of wording, is the following: "The contracting parties agree that, in all matters relating to commerce and navigation, any privilege, favor, or immunity whatever, which either * * * has *actually* granted or may hereafter grant to the subjects or citizens of any other state shall be extended immediately and unconditionally to the subjects or citizens of the other contracting party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favored nation."[51] Another form found repeatedly in English treaties in common with those of other nations reads: "No higher or other duties," or "no higher or other import * * * or export duties" shall be paid on the goods of one country in the territories of the other than are payable on like goods of other countries.

Earlier British treaties simply stipulated for "reciprocal liberty of commerce,"[52] or "reciprocal freedom of commerce."[53]

A review of the circumstances which have attended the regular occurrence of the clause in modern English treaties[54] furnishes an object lesson in both the advantages and disadvantages which attend its use. Its extensive and emphasized employment, with a very

provides: "It is mutually agreed between the high contracting parties that, in the intercourse of navigation between their two countries, the vessels of any third power shall in no case obtain more favorable conditions than those stipulated in the present convention in favor of British and French vessels."

[51] Treaty between Great Britain and Paraguay, Oct. 16, 1834, art. 2. *Cf.* also treaties of Great Britain with Honduras, Jan. 21, 1887; France, Feb. 28, 1882; Mexico, Nov. 27, 1888; Japan, July 16, 1894.

[52] Treaty between United States and Great Britain, July 3, 1815, art. 1.

[53] Great Britain and Venezuela, April 18, 1825, art. II; and Great Britain and Russia, Jan. 12, 1859, art. I. In the convention between Great Britain and the United States, March 2, 1899, and Jan. 13, 1902, art. 5, appears the following: "In all that concerns the right of disposing of every kind of property, real and personal, citizens or subjects of each * * * shall in the dominions of the other enjoy the rights which are or may be accorded to the subjects or citizens of the most-favored nation."

[54] In 1903 no less than forty-two English treaties with foreign powers contained most-favored-nation clauses. *Cf.* Parl. Pap. Commercial No. 9. (1903).

definite and determined object became one of the leading features of English commercial politics after the making of the Cobden treaty (1860). As the practical champion of commercial liberalism, and as the advocate of universal free trade, England found the most-favored-nation clause a necessary and invaluable instrument. It soon became evident that although the English were enjoying all the benefits which France extended to the trade and commerce of every other nation, yet the balance of advantages under that treaty was in favor of France. The influence of the new conditions upon British policy is apparent in the treaties which followed with Belgium July 23, 1863, with Italy Aug. 6, 1863, and with Prussia and the Customs Union May 30, 1865.[55] In the last-named treaty, England acquired a position more favored than that of France, in that most-favored-nation treatment was extended to the British colonies and all other English possessions. Between 1860 and 1866, England made other most-favored-nation treaties with Nicaragua, Turkey, Belgium, San Salvador, and Colombia. After the change occasioned in Anglo-French commercial relations by the temporary change in French policy, in 1872, a new treaty was made between the two nations, July 23, 1873. Treaties were also made with the Bey of Tunis, July 19, 1875, and with Austria, November 26, 1877. In these treaties the English invariably insisted upon the insertion of the most-favored-nation clause.[56]

The convention made between England and France, February 28, 1882, guaranteed to "goods of English origin or manufacture," with the exception of "colonial produce," most-favored-nation treatment. On May 22, 1882, England made a most-favored-nation treaty with Portugal, the latter receiving the right to concede special advantages to Brazil. The treaty made with Italy, June 15, 1883, was based entirely on most-favored-nation treatment. England also won, against much opposition, a most-favored-nation treaty with Spain, April 26, 1886, in which the expressed advantages were extended to the colonies of both contracting parties. Between 1880 and 1890 other treaties, too, of the same general character were made with Servia,

[55] Cavaretta, *op. cit.*, 109–110.
[56] *Ib.* 113.

Roumania, Ecuador, the Transvaal, Montenegro, the Kongo, Uruguay, Egypt, Mexico, Paraguay, Honduras, and Greece. Thus, in the prosecution of this policy, England achieved many advantages. She was giving very little — for how much could she, with her free trade policy, concede? — and for this little she was getting much.[57]

She had much reason to be flushed with the success of her commercial policy; yet, both free trade and the unlimited interpretation of the most-favored-nation clause were destined to cause England no little inconvenience.

The reaction from the growing sentiments of free trade toward protection, which began with the revolt of Germany, and soon became strong among European states, gave a new direction and another form to their commercial treaties. Militarism, an emphatic national self-consciousness, and the application of the historical method to economic questions appear among the chief causes which checked the tide of free trade and once more turned Europe toward protection.[58] The continental nations awoke to a full realization of the difference between England's and their own economic situations. Special tariffs, plus the most-favored-nation clause, became the order of the day. Then there followed a series of treaties of which the most-favored-nation clause alone was the basis. The more recent commercial policies of France, Germany, Portugal and Spain have been referred to above.

In 1884, Lord Granville demanded that the advantages which the United States were extending to Hawaii and some states of South America, especially in regard to the importation of sugar, be extended to the British West Indies. This demand was based on the most-favored-nation clause (article II) in the treaty between the United States and Great Britain of July 3, 1815.[59] The United States answered that the clause should not and could not be interpreted extensively.

[57] *Cf.* Smart: The Return to Protection, 130.

[58] *Cf.* Cunningham: The Free Trade Movement, 84 ff.

[59] "No higher or other duties * * * on the imports or exports of any articles the growth, produce, or manufacture of the territories of one * * * into one from the other * * * than payable on the like articles * * * of any other foreign country."

With the rise of sugar-bounties question, England found her attitude concerning countervailing duties inconsistent with her interpretation of the most-favored-nation clause. This question caused considerable agitation in England and in several of the colonies, and it was even urged that the government be given freedom to use, when circumstances warranted, some of the instruments of protection. The preferential tariff movement led to a propaganda in the British colonies, especially in Canada, against the clause of the most-favored-nation. This agitation soon centered in the Imperial Federation League. The chief grievance against the clause arose from the fact that it prevented the colonists from conceding special advantages which they desired to their trade with the mother country. The clause operated so as to extend at once such favors as were granted to the latter to other nations. The operation of the clause appears to have extended also to trade between the colonies and thus to have been altogether an obstacle to preferential treatment. In 1890 the Canadians made a strenuous attack upon the clause and voted that it be not inserted in future treaties. The Canadians regarded it as all-important to their trade that this obstacle be removed, and they presented memorials to that effect to the crown in 1893. The Imperial Government in its reply emphasized the importance of the clause in maintaining British commercial independence. Recognizing its failure in the attempt to convert the world to the principles of free trade, the English government regarded the most-favored-nation clause as an instrument by means of which they could "so to speak, enjoy indirectly the benefits and advantages enjoyed by other states." [60]

The Canadians drew up a law in 1897, of which article 17 read,

> When the customs tariff of any country admits the products of Canada on terms which on the whole are as favorable to Canada as the terms of the reciprocal tariff referred to are to the countries to which it may apply, articles which are the growth, produce or manufacture of such country, when imported directly therefrom, may then be entered for duty or taken out of warehouse for consumption in Canada at the reduced rates of duty provided in the reciprocal tariff set for them in schedule D.

[60] Cavaretta, *op. cit.*, 125.

It was urged against this law that it conflicted with the English treaties of commerce with Belgium, July 23, 1862, and with Germany, May 30, 1865, which provided that the products of those countries should not be subjected in English colonies to higher duties that the produce of the United Kingdom or any other country of like kind. The Canadian government argued, relying upon the American example, that there would be no unequal treatment, because Belgium and Germany could obtain the same treatment as England upon satisfying the same conditions.[61] In view of the wording of the English treaties, and of the policy of England with regard to these treaties, this argument seems unsupportable, as neither coincides with, and therefore neither can depend upon, the principles upon which the United States practice is based. The two treaties were, however, soon abrogated by the English government, so that the Canadian tariff law might go into effect. Other nations then recognized the contention that arrangements made between England and Canada came under a special class as colonial arrangements, and refrained from demanding similar treatment under the most-favored-nation clauses in their treaties.

The free-trade example of England had failed to bring about the cosmopolitanism which had been the cry of the Cobdenites. Universal free trade was not to be realized with a bound. It may come — as may perhaps universal disarmament — as a result rather than as a cause of cosmopolitanism, but in the meantime the pioneer finds it hard indeed to be consistent, to defend and to maintain her commercial position without using weapons similar to those which her competitors employ.

It is evident, not only from the mass of writing upon the subject, but from the action of the government, that the English are undergoing a change of sentiment as concerns commercial policy, and by no means the least among the indications of this, is the attitude of the English Foreign Office in the first few years of this century toward English obligations under the most-favored-nation clause.

(The remainder of Mr. Hornbeck's article, dealing with interpretation, will appear in the next issue of the JOURNAL.)

[61] *Cf.* Visser, *op. cit.*, 279.

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ELIHU ROOT

It would be unbecoming in the JOURNAL as the organ of the American Society of International Law, of which Mr. Root is the first and only president, to eulogize his services as secretary of state. It is, however, the sober truth to state that his tenure of office from July, 1905, to January 27, 1909, marks a distinct era in American diplomacy, and that the foreign relations of the United States have in no single period, if indeed ever before, been regulated in accordance with the dictates of an equal and impartial justice, irrespective of race or nationality, political geography, or form of government. Great as are his actual achievements as secretary of state, the spirit which animated him and which he has infused into the foreign policy of the United States is still greater, of which the essence is a desire to decide the

problem justly, whether the solution be advantageous or not to the United States, to consider the controversy not as an advocate or partisan but as a judge doing equity rather than administering law, and by removing the controversy between nations, to dissipate ill feeling and jealousy, to minimize friction, and to establish confidence and friendship, based upon a correct understanding and appreciation of the motives and purposes of the contending parties. "The rule of law is to supersede the rule of man." [1]

The spirit which has guided him in the administration of his great office, was set forth and illustrated by Mr. Root on three great occasions: first, in his various addresses delivered in his South American trip in 1906; second, in his address on laying the cornerstone of the new building for the International Bureau of the American Republics in Washington, May 11, 1908; and finally, on February 26, 1909, in an address of great power, beauty and feeling, at the dinner given to him by the American Peace Society of New York.

As honorary president of the Third Conference of American Republics held at Rio de Janeiro on July 31, 1906, Mr. Root said:

> No nation can live unto itself alone and continue to live. Each nation's growth is a part of the development of the race. There may be leaders and there may be laggards, but no nation can long continue very far in advance of the general progress of mankind, and no nation that is not doomed to extinction can remain very far behind. It is with nations as it is with individual men; intercourse, association, correction of egotism by the influence of other's judgment, broadening of views by the experience and thought of equals, acceptance of the moral standards of a community the desire for whose good opinion lends a sanction to the rules of right conduct — these are the conditions of growth in civilization. A people whose minds are not open to the lessons of the world's progress, whose spirits are not stirred by the aspirations and the achievements of humanity struggling the world over for liberty and justice, must be left behind by civilization in its steady and beneficent advance.[2]

And in speaking of the just ambition of his country, he said in the same remarkable address:

> We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression

[1] Secretary Root's "Speeches in South America," 1906, p. 9.
[2] Id., p. 12.

of the strong. We neither claim nor desire any rights, or privileges, or powers that we do not freely concede to every American Republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit, but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.[1]

In the address at the laying of the cornerstone of the new building for the International Bureau of the American Republics, Mr. Root said:

Many noble and beautiful public buildings record the achievements and illustrate the impulses of modern civilization. Temples of religion, of patriotism, of learning, of art, of justice, abound; but this structure will stand alone, the first of its kind — a temple dedicated to international friendship. It will be devoted to the diffusion of that international knowledge which dispels national prejudice and liberalizes national judgment. Here will be fostered the growth of that sympathy born of similarity in good impulses and noble purposes, which draws men of different races and countries together into a community of nations, and counteracts the tendency of selfish instincts to array nations against each other as enemies. From this source shall spring mutual helpfulness between all the American republics, so that the best knowledge and experience and courage and hope of every republic shall lend moral power to sustain and strengthen every other in its struggle to work out its problems and to advance the standard of liberty and peace with justice within itself, so that no people in all of these continents, however oppressed and discouraged, however impoverished and torn by disorder, shall fail to feel that they are not alone in the world, or shall fail to see that for them a better day may dawn, as for others the sun has already risen.

It is too much to expect that there will not be controversies between American nations, to whose desire for harmony we now bear witness; but to every controversy will apply the truth that there are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.

And finally, in New York, at the banquet in commemoration of his services to the cause of peace, he said:

It seems to me that the Peace Society in asking me to dine with them has gathered here all the evidences, all the proofs, the demonstration of what it is worth to preserve — peace; the faces of my old home, the dear old friends of a lifetime, the children of many a friend who has passed away during my absence from New York, all this that I see about me, is what makes it worth while that peace shall

[1] Id., p. 12.

be defended and continued by this modern civilization which substitutes peace for war. We have passed in the development of modern society far from those old days when men fought for the mere joy of fighting; except here and there an individual and here and there a half-savage community, no one now makes war for the love of war. But there are causes of war, and I am going to take the occasion of having you here to suggest some missionary work in the interests of the society which is giving this dinner, and which, it seems to me, my friends have invaded and overwhelmed.

The work of a peace society and the work of peace-loving men and women, the work of all those who love home, who desire that mankind shall be enlarged in intelligence and in moral vision, of all those who desire to see science and art and the graces of life and sweet charity and the love of mankind for one another continue and grow among men, their work is to aid, not by great demonstration, but by that quiet, that resistless influence which among great bodies of men makes up the tendency of mankind and in the long process of the years moves men from savagery and brutality to peace and brotherhood. It rests with the army and the navy to make aggression and injustice unprofitable and unattractive. It rests with you and with me, with every woman without struggling for the right of suffrage, to exercise the powers that God has already placed in our hands, of every man in the exercise of his duties, political and social, to morally move the conceptions of an honorable life away from the old ideas of savagery toward the new ideas of civilization, of humanity, that in their progress gradually approximate to the supreme idea of Christianity.

Peace can never be except as it is founded upon justice. And it rests with us in our own country to see to it that the idea of justice prevails and prevails against the declamation of the demagogue, against the interested exhortation of the politician, against the hot temper of the foolish and of the inconsiderate. If we would have peace it isn't enough to cry "Peace! Peace!" It is essential that we should promote and insist upon the willingness of our country to do justice to all countries of the earth.

In the exercise of those duties in which the ambassadors of Great Britain, of Brazil and of Japan have displayed so great a part in the last few years in Washington the great obstacle to the doing of things which make for peace has been not the wish of the diplomatist, not the policy of the government, but it has been the inconsiderate and thoughtless unwillingness of the great body of the people of the respective countries to stand behind the man who was willing for the sake of peace and justice to make fair concessions.

There is a peculiar situation created when a diplomatic question arises between two countries. It is the duty of the diplomatic representatives to argue each the cause of his own country; he cannot turn his back upon an opponent in that friendly contest and state to his countrymen the weakness of his own position and the strength of the other side's position, and it is one of the great difficulties of peace making and peace keeping that the orators, the politicians, the stump speakers, aye, often, the clergymen of each country, press and insist upon the extreme view of their own country, and impress upon the minds of the great masses of people who have not studied the question the idea that all right is upon one side and all wrong upon the other side.

If you would help to make and keep peace, stand behind the men who are in the responsible positions of government, ready to recognize the fact that there is some right on the other side.

War comes to-day as the result either of actual or threatened wrong by one country to another, or as the result of a suspicion by one country that another intends to do it wrong, and upon that suspicion, instinct leads the country that suspects the attack to attack first; or from bitterness of feeling, dependent in no degree whatever upon substantial questions of difference, and that bitterness of feeling leads to the suspicion, and the suspicion in the minds of those who suspect and who entertain the bitter feeling is justification for war. It is their justification to themselves.

The least of these three causes of war is actual injustice. There are to-day acts of injustice being perpetrated by one country upon another; there are several situations in the world to-day where there is gross injustice being done. I will not mention them, because it would do more harm than it would good, but they are few enough. By far the greatest cause of war is that suspicion of injustice, threatened and intended, which comes from exasperated feeling.

Now, the feeling which makes a nation willing to go to war with another makes real causes of difference of no consequence. If the people of two countries want to fight they will find an excuse, a pretext, find what seems to them sufficient cause in anything. Questions which can be disposed of without the slightest difficulty between countries really friendly are insoluble between countries really unfriendly. And the feeling between the peoples of different countries is the product of the acts and the words of the peoples of the countries themselves, not of their governments. Insult, contemptuous treatment, bad manners, arrogant and provincial assertion of superiority is the chief cause of war to-day.

And in this country of ours we are far from free from being guilty of all those great causes of war. The gentlemen who introduced into the legislatures of California, Montana and Nevada the legislation regarding the treatment of the Japanese in those states doubtless had no conception of the fact that they were doing to that great nation of gentlemen, of soldiers, of scholars and scientists, of statesmen, a nation worthy of challenging and receiving the respect, the honor and the homage of mankind, an injury by an insult that would bring on private war in any private relation in our own country.

Thank Heaven the wiser heads and the sounder hearts, instructed and enlightened upon the true nature of the proceeding, prevailed and overcame the inconsiderate and foolish. There are no two men in this room to-night who cannot bring on private war between themselves by an insult without any cause or reason, and it is so with the nations, for national pride, national sensitiveness, sense of national honor, are more keenly alive to insult than can be the case with any individual.

But a few days ago a member of the House of Representatives, with no other apparent purpose than to make himself prominent by an attack upon an American, charged upon the Chief Magistrate of the little Republic of Panama a fraudulent conspiracy with regard to a contract under negotiation by the government of that country regarding the forests of Panama.

All Panama was instantly alive with just indignation. This insult was felt all the more keenly because we, with our ninety millions and our great navy and

army, presented an overwhelming and irresistible force with a little republic whose sovereignty we are bound, trebly bound, in honor to maintain and respect.

These are the things that make for war, and if you would make for peace you will frown upon them, condemn them, ostracize and punish by all social penalties the men who are guilty of them until it is understood and felt that an insult to a friendly foreign power is a disgrace to the insulter, upon a level with the crimes that we denounce and for which we inflict disgraceful punishment by law.

Two-thirds of the suspicion, the dislike, the distrust, with which our country was regarded by the people of South America, was the result of the arrogant and contemptuous bearing of Americans, of people of the United States, for those gentle, polite, sensitive, imaginative, delightful people.

Mr. Choate has alluded to my visit there, to the generous, magnanimous, hospitality that they have inherited from their ancestors of Spain and Portugal, to the way they opened wide the gateways of their land and their hearts to a message of courtesy and kindly consideration. No questions existed before to be settled, no serious questions have been settled, but the difference between the feeling, the attitude, of the people of Latin America and our Republic to-day from what it was four years ago is the result of the conspicuous substitution of the treatment that one gentleman owes to another for the treatment that one blackguard pays to another.

Now this is the subject for you to deal with. The government cannot reach it. Laws cannot control it; public opinion, public sentiment must deal with it, and when the public opinion has risen to that height all over the world that the peoples of every country treat the peoples of every other country with that human kindness that binds home communities together you will see an end of war. And not until then.

But, my friends, it becomes less and less necessary to preach peace. We have not reached ideal perfection yet, far from it, but the way to judge of conditions in this world is not by comparing them with the standard of ideal perfection; it is by comparing the conditions to-day with the conditions of the past and noting, not what we can do to-day — if we note that alone we must be discouraged; if we note that alone we must be convinced of the desperate selfishness, the injustice, the cruelty of mankind — but if we compare the conditions of to-day with the conditions of yesterday and the last decade and the last generation and the last century and centuries before, no one can fail to see that in all those qualities of the human heart which make the difference between cruel and brutal war and kindly peace the civilized world is steadily and surely advancing day by day.

No one can fail to see that the continuous and unswerving tendency of human development is toward peace and the love of mankind.

My friends, if all men could feel toward each other as I feel toward you to-night the Peace Society might well disband.

It is to be hoped that the addresses of Mr. Root delivered on public occasions may be collected so that the public may have within the compass of a single volume Mr. Root's contributions to the spirit of American diplomacy.

INTERNATIONAL LAW AT THE FIRST PAN-AMERICAN SCIENTIFIC CONGRESS

At the sessions of the First Pan-American Scientific Congress, which were held at Santiago, Chile, from December 25, 1908, to January 5, 1909, the subject of international law received a great amount of attention. The discussion of international law problems was participated in by many noted specialists and excited great public interest, which centered especially around the problem proposed by Señor Alexandro Alvarez[1] as to whether there can be said to exist a special American international law. Señor Alvarez, the Councillor of the Chilian Foreign Office, and Professor Sa Viana, of Rio de Janeiro, presented papers on this subject. On the basis of these papers and the discussions thereof, the section of the Congress adopted the following resolution which was later sanctioned by the Congress itself:

> The First Pan-American Scientific Congress recognizes that in the New World there exist problems *suo generis* and of a character completely American; and that the states of this hemisphere have regulated by means of more or less general treaties, matters which interest only themselves or which, though of a universal interest, have as yet not been incorporated in a world-wide convention. In this last case there have been incorporated in international law principles of American origin. The sum of these materials constitutes what may be called American problems and situations in international law. The Congress recommends to all states of this continent that in their faculties of jurisprudence and the social sciences, there shall be given special attention to the study of this subject.

Señor Alvarez, the mover of this resolution, did not desire to propose the establishment of a separate system of international law, but intended merely to point out the fact that on account of the diversity of origin of political institutions, of historical development, and of natural conditions, there exist on the American continent a series of special and characteristic problems which require special attention, and which cannot be solved by a merely imitative study of the established principles of European international law. As in certain matters, America has led the way in the past, so also, in the future, it is desirable that her countries should have a definite American policy in international law naturally flowing out of the special conditions of their political and economic life.

Another subject which aroused discussion was the policy of the most-favored-nation clause. Señor Ernesto Frias of Uruguay read a paper on this subject, in which he favored the abandonment of the most-favored-nation clause for a policy of maximum. minimum, and special

[1] See Mr. Alvarez's article on this subject, *ante*, p. 269.

tariffs. Señor Julio Philippi, of Chile, who also read a paper, did not fully agree with Señor Frias upon the incompatibility of the most-favored-nation clause with the other systems of tariff policy. He acknowledged the inconvenience caused by the uncertainty as to the interpretation of the most-favored-nation clause, and advocated that nations stipulating for the clause should indicate in the same treaty what interpretation was to be followed. As a result of this discussion, the following resolution was voted:

The Pan-American Scientific Congress, in view of the difficulties which have been caused by the interpretation of the most-favored-nation clause, recommends that the bearing of the clause should be defined in each treaty in which it is stipulated. When the most-favored-nation clause is granted, the respective governments should remain free to make special concessions to neighboring countries.

Señor Jose Francisco Urrutia, the Minister of Foreign Affairs of the Republic of Colombia, contributed two papers — one on the "Evolution of the Principle of Arbitration in America," the other on the "Adhesion of American Countries to certain Principles or Treaties of World-wide Character." These papers were read in abstract by General Rafael Uribe Uribe, who also took a leading part in the discussions of the section. Señor Marcial Martinez de Ferrari read a paper on the "Results of the Second Hague Conference," at the conclusion of which he proposed the following resolution:

It is of positive importance, not only for America, but for the world, that the countries of America should be in accord upon the principles which, as far as they are concerned, represent an effective advance in international relations, and which may later receive acceptance in international conferences and specially in the Hague Conference.

Mr. Paul S. Reinsch read a paper on "International Administrative Law in its Relations to the American States," in which he outlined the development of joint action in international unions and the opportunities for usefulness in the Union of American Republics. At the conclusion of the paper, it was voted that

The Congress recognizes the importance of the assistance which governments mutually lend each other in their administrative action, and in order to foment the development of these relations, it declares its readiness to cooperate, within the field of investigation and scientific information, in the work which is carried on by the International Union of American Republics, the Bureau established in Washington, and the Pan-American commissions recently created in the different countries of the continent.

In the field of international politics, Mr. Archibald C. Coolidge read a paper on "America in the Pacific," in which he dealt with the relations of American countries with the Orient. The section met under the presidency of Mr. Leo S. Rowe.

The papers presented contained an abundance of interesting material upon American precedents in international law. The illustrations used by South-American writers would naturally be taken largely from the experience of their own and neighboring nations. In the discussions a truly American spirit prevailed and there was no desire unduly to press the point of view of any particular government. The guiding purpose which had animated the men who prepared the Congress was the essential unity of American science. They considered it desirable that a representative Congress should consider the specific basis and achievements of American science in all its branches. The discussions in the section on international law were in full accord with this purpose. While in no sense favoring a secession from the universal science of international law, the men here assembled attempted to determine the general character and outline of those problems which the American science of international law must solve for itself, either because of conditions in our countries which do not prevail in other continents, or because of the fact that we have come to an accord upon certain principles which as yet have not been made a part of universal international law.

THE RESTORATION OF CUBAN SELF-GOVERNMENT

For the second time within the administration of President Roosevelt Cuba has been evacuated by American forces and turned over to the duly constituted government of the republic. As is well known the war between the United States and Spain was caused by the unsatisfactory condition of Cuba, and the occupation of Cuba by American forces, begun in 1898, was continued until May 20, 1902, when President Palma assumed office. During the summer and fall of 1906 a revolution broke out in Cuba which paralyzed not merely the government but threatened its international position so that the United States felt constrained under the treaty between it and Cuba, dated May 22, 1903, and by virtue of Annex 3 of the Cuban Constitution of May 20, 1902, to intervene "for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with

respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba." [1]

In order to ascertain the exact situation in Cuba, the President sent the Honorable William H. Taft, then secretary of war, and the Honorable Robert Bacon, then assistant secretary of state, to Cuba, the former of whom assumed the office of provisional governor of Cuba by proclamation,[2] proclaimed amnesty,[3] issued decree number eleven declaring the congress of Cuba in recess during the provisional government of Cuba,[4] and on October 13, 1906, turned the provisional government over to Governor Magoon.[5] Governor Magoon remained in office ably and conscientiously administering the trust reposed in him by the President and the people of Cuba from October 13, 1906, until January 28, 1909, when President Gomez assumed office.

In order that the American occupation and its services to Cuba may be properly estimated a brief résumé is given of the laws drafted and promulgated by the provisional government: [6]

1. *An elaborate Electoral Law*, granting manhood suffrage and framed after the most advanced Australian ballot system, dated December 12, 1907; for the election of municipal and provincial officers on August 1, 1908, and for a general election for President, Vice-President, etc., on November 14, 1908.

2. *An Organic Provincial Law* promulgated May 29, 1908, in force October 1, 1908. Under the law prevailing at the time we assumed the government, the Cuban Congress had legislated generally and the municipalities locally for all land under their jurisdiction. As the whole territory of Cuba was covered by municipal jurisdiction, nothing was left for the provincial authorities to legislate upon or to administer except public works, and the major portion of the provincial revenues collected were expended on personnel, in salaries and expenses.

The limitation of powers of provincial officials is the same under the new law, but it prescribes the portion of the revenue collected which may be spent upon salaries and general expenses.

3. *An Organic Municipal Law*, promulgated May 29, 1908, in effect October 1, 1908, making the municipalities entirely autonomous, without any interference by the general government in their local affairs. No provincial government is needed

[1] For a more extended account of the nature of the second intervention in Cuba see this Journal, *1*:142–50.

[2] Cuban Gazette, September 29, 1906.

[3] Id., October 10, 1906.

[4] Id., October 12, 1906.

[5] Id., October 13, 1906.

[6] The facts concerning the legislation passed in Cuba under the provisional government were furnished by Paul Charlton, Esq., law clerk of the Bureau of Insular Affairs, War Department, Washington.

under the system heretofore and now prevailing in Cuba, but the establishment of such government is demanded by Cuban public sentiment, most likely for the reason that it affords places and emoluments to willing patriots.

4. *A Judiciary Law.* The body of the law in force in Cuba consists of enactments originally intended to apply to the Spanish Peninsula, and extended by royal decree or order to Cuba, as the same have been from time to time modified and amended by royal and military orders, and by laws enacted by the Cuban Congress during the Palma administration.

Under this law the supreme judges are to be appointed by the president with the advice and consent of the Cuban senate; all other judicial officers, excepting municipal judges, are to be appointed by the president from ternaries submitted by the Chamber of Administration of the Supreme Court.

Judicial appointments, under the Supreme Court, are originally made for four years. If the judge so appointed is satisfactory, his reappointment follows for a term of six years, and if still satisfactory at the end of said term he is reappointed for life, and is subject to removal only by impeachment.

5. *A Civil Service Law*, modeled on that of the United States, promulgated to take effect at the end of the fiscal year. As all appointive offices will then be filled, and the persons so appointed under the terms of the law pass into the civil service, its effect will not be manifest except in the future.

6. *Law of the Executive Power.* This makes legal provision for the administration of the Executive departments which are: State, Justice, Government, Treasury, Public Works, Public Instruction, Sanitation, Charities, Agriculture, and Commerce and Labor.

The foregoing laws furnish a complete political code for Cuba. Beside them there were promulgated the following laws:

The Law of Armed Forces, providing for a rural guard and permanent army.
Code of Military Justice, providing articles of war.
A Game Law.

In addition there were submitted, and now await the action of the Cuban congress, laws on: drainage and irrigation, telephones, notaries, and mortgages.

Legislation is urgently required on the following questions: Revision of the codes, laws for public instruction, railways, eminent domain, public works, administrative contracts, forestry, mines, and patents.

The foregoing laws were all drafted by an advisory commission appointed by the provisional governor, composed of nine Cubans representing the several political parties, and three Americans, and was headed by Colonel E. H. Crowder, General Staff, U. S. A., as its president.

During the provisional government there was expended on roads, bridges, harbors, light-houses, and other public works $22,956,659.36, the average yearly budget for the period amounting to about twenty-

three million dollars. Prior to the election in August, 1908, a census of Cuba was taken and completed, under the direction of an official of the United States Census Bureau.

This brief statement sufficiently shows the earnest purpose of the American occupation, for the United States has sought by all means in its power to enable Cuba to maintain that independence acquired for it by the United States. The desires of the American people for the success of the sister republic was admirably voiced by President Roosevelt in his telegram of January 29, 1909, to the president and congress of the republic of Cuba, announcing the termination of the American occupation:

> Upon the occasion of this final act, I desire to reiterate to you the sincere friendship and good wishes of the United States, and our most earnest hopes for the stability and success of your government. Our fondest hope is that you may enjoy the blessings of peace, justice, prosperity, and orderly liberty, and that the friendship which has existed between the republic of the United States and the republic of Cuba may continue for all time to come.

THE FIRST DECISION OF THE CENTRAL AMERICAN COURT OF JUSTICE

In its October (1908) issue the JOURNAL called attention to the formation of the Central American Court of Justice, explained its jurisdiction and procedure, and furnished a list of the judges of the court. In July, 1908, Honduras appeared before the court accusing Guatemala and Salvador of unneutral conduct in that the sister republics were taxed with fomenting revolution in Honduras. The pleadings in this remarkable case were set out in sufficient detail in the editorial comment to which reference is made.[1]

After considering the case during a period of several months and weighing the arguments addressed to it by the counsel of the parties litigant, the court delivered its judgment on December 19, 1908. The *considerandos* have not been received but will be printed together with the judgment in the section devoted to judicial decisions in a subsequent issue. A literal translation of the text of the judgment follows:

> In the city of Cartago, Costa Rica, at 12 at night of December 19, 1908. The deliberations of the court having been considered to have been concluded, so that it could proceed to render judgment on the suit begun by the government of the republic of Honduras against the governments of El Salvador and Guatemala,

[1] Vol. 2, p. 835.

on account of responsibility with which the former government charges the latter two in connection with the revolution which occurred in the former of said republics in July of this year, the honorable presiding magistrate proposed the following set of questions to be answered in rendering the judgment which was to decide the controversy:

1. Should we allow the exception of inadmissibility of the complaint, as interposed by the representative of the Guatemalan government on the alleged ground that said complaint was filed without exhausting the means of settlement between the respective chancelries?

Negative: all five judges.

2. Should we allow the exception, interposed by the same party, alleging insufficiency of the petition to institute proceedings, owing to the circumstance that it was not accompanied by the appropriate evidence when the charge was first preferred?

Negative: all five judges.

3. Is it demonstrated, and should it be so declared, that the government of the republic of El Salvador has violated article 17 of the General Treaty of Peace and Amity concluded at Washington on December 20, 1907, by not arresting and trying the Honduran emigrants who were threatening the peace of their country?

Negative: Judges Gallegos, Bocanegra and Astua.

Affirmative: Judges Ucles and Madriz.

4. Is it demonstrated, and should it be so declared, that the government of the republic of El Salvador violated article 2 of the Additional Convention annexed to said Treaty, by protecting or encouraging the aforesaid insurrectionary movement?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Ucles.

5. Is it demonstrated, and should it be so declared, that the government of the republic of El Salvador contributed toward the accomplishment of said political offense by a culpable lack of diligence?

Negative: Judges Gallegos, Bocanegra and Astua.

Affirmative: Judges Ucles and Madriz.

6. Should, consequently, the action begun against the government of El Salvador be declared proper and the latter therefore sentenced to pay the damages asked?

Negative: Judges Gallegos, Bocanegra and Astua.

Affirmative: Judges Ucles and Madriz.

7. Is it demonstrated, and should it be so declared, that the government of the republic of Guatemala violated article 17 of the General Treaty of Peace and Amity concluded at Washington on December 20, 1907, by not arresting and trying the Honduran emigrants who were threatening the peace of their country?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

8. Is it demonstrated, and should it be so declared, that the government of the republic of Guatemala violated article 2 of the Additional Agreement to said treaty by protecting or fomenting the said insurrectionary movement?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

9. Is it demonstrated, and should it be so declared, that the government of the republic of Guatemala contributed toward the accomplishment of the said political offense by a culpable lack of diligence?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

10. Should, consequently, the action begun against the government of Guatemala be declared proper and the latter therefore sentenced to pay the damages asked?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Affirmative: Judge Ucles.

11. Should the losing party or parties be sentenced to pay the costs of trial?

Negative: Judges Gallegos, Bocanegra, Madriz and Astua.

Judge Ucles answered that the governments of El Salvador and Guatemala should be sentenced to pay the costs.

From the foregoing vote, as stated, it results that judgment is pronounced rejecting the action brought against the high defendants, without sentencing them to payment of the costs.

JOSE ASTUA AGUILAR — ALBERTO UCLES
SALV. GALLEGOS — JOSE MADRIZ
ANGEL M. BOCANEGRA — ERNESTO MARTIN, Sec.

It was not difficult to foresee that the court would take jurisdiction, even although the defendants maintained that diplomatic negotiations, a condition precedent, had not taken place, and it seemed probable that the court would find the allegations of Honduras unsupported by the evidence submitted. The decision marks a great progress toward the judicial settlement of international disputes and shows the complete analogy between public and private law. Whether the judgment of the court is favorably received by Central America or is subjected to criticism the fact remains that the court performed its delicate mission under trying circumstances and that its intervention in the dispute between Honduras on the one hand and Guatemala and Salvador on the other without a request from any of the litigants prevented the outbreak of war in Central America. The action of the court is thus a confirmation of the partisans of arbitration that an international tribunal can not only maintain peace, but in appropriate cases prevent war.

THE VENEZUELAN SITUATION

On June 13, 1908, Secretary Root informed the Venezuelan Government that by reason of the persistent refusal of the existing government of Venezuela to give redress for the governmental action which

substantially destroyed or confiscated all American interests in Venezuela or to submit the claims of American citizens for such redress to arbitration the Government of the United States was forced to the conclusion "that the further presence in Caracas of diplomatic representatives of the United States subserves no useful purpose." Mr. Root therefore directed the American chargé d'affaires to place American interests in the hands of the representative of Brazil, which had already offered its services to the United States. The Venezuelan Government was informed of the decision of the United States, and diplomatic relations between the countries were thereupon severed.

The claims of American citizens referred to by the secretary of state and the refusal of Venezuela to settle them by diplomatic negotiation or to submit them to arbitration, which led to the withdrawal of the American representative, are five in number, namely, (1) claim for the expulsion of A. F. Jaurett; (2) the refusal to arbitrate the claim of the Orinoco Corporation; (3) a refusal to reconsider and to submit to arbitration the claim of the Orinoco Steamship Company, passed upon adversely by the Mixed Commission under the protocol of February 17, 1903; (4) the persistent refusal of Venezuela to redress the wrongs of the New York and Bermudez Company, or to submit the question to impartial arbitration; and (5) finally the unwillingness of Venezuela to adjust the claim of the United States and Venezuela Co., familiarly known as the "Crichfield Claim," or to submit the controversy to arbitration.[1]

While it is impossible within the space of an editorial note to set forth these various claims in detail, it is essential to give a brief summary of each of the claims in order to understand the exact nature of the controversy between Venezuela and the United States.

(1) *The Jaurett Claim.* A. F. Jaurett, an American citizen, was notified by the Venezuelan authorities on Saturday evening, November 12, 1904, after the closing hours of business to leave Venezuelan territory within twenty-four hours. A quotation from Mr. Root's despatch, dated February 28, 1907, to Minister Russell sufficiently states the facts and discusses the attitude of the United States.

> The reason assigned by the authorities for the expulsion of Mr. Jaurett is that he was notoriously prejudicial to public order. On the following morning — that is to say, Sunday — the prefect of police waited upon Mr. Jaurett and formally

[1] For full details of the claims and the diplomatic correspondence relating to them, see Senate Document No. 413, 60th Congress, first session.

ordered him to withdraw from the territory of Venezuela in twenty-four hours. Although Mr. Jaurett attempted to obtain a modification of the order, so that he might be able to arrange his affairs and although the representative of the government of the United States accompanied and seconded him in this reasonable request, the Venezuelan government refused to grant such permission. Mr. Jauratt was therefore obliged to quit the country on Monday morning in pursuance of the order of the governing authorities of Venezuela, leaving behind him his property, and without being given the opportunity to arrange and set in order his business affairs.

The government of the United States neither questions nor denies the existence of the sovereign right to expel an undesirable resident. It cannot be overlooked, however, that such a right is of a very high nature and that the justification must be great and convincing. Otherwise residence in a foreign country would be neither safe nor profitable, for expulsion might at any moment deprive a resident of the legitimate rewards of a lifetime. While, therefore, the existence of the right is not denied, its exercise must be limited. The act is sufficiently harsh in itself. The manner and method of expulsion should not be humiliating, for it is not the purpose to humiliate and inconvenience the resident expelled, but to save the state from dangers resulting from the residence of the undesirable alien.

It will be observed that the United States did not question the right of Venezuela to expel an undesirable alien, but Mr. Root felt that an American citizen should not be sent out of a country without an opportunity being given him to meet the charges made against him, and to arrange his business affairs. The promulgation of the decree on Saturday, the intervention of Sunday, rendered it impossible for Mr. Jaurett to arrange his affairs. It should be stated furthermore that Mr. Jaurett was domiciled in Venezuela and that article 80, section 22 of the Constitution of Venezuela, by virtue of which the president is authorized to expel foreigners, does not apply to domiciled aliens. Mr. Jaurett's claim is justified, it would seem, not merely by the theory and practice of international law but by a decision of the Venezuelan Commission in 1903, in the case of Buffalo v. Venezuela.[2]

(2) *The Orinoco Corporation Case.* This is a case of the conflict of concessions of the same land, *i. e.,* the Delta of the Orinoco, granted to two people at different times. It appears that one C. C. Fitzgerald was, in 1883–4, was given the concession by the sanction of the Venezuelan Congress. January 1, 1886, the general European minister of Venezuela made an agreement with an American named George Turnbull, whereby the latter was to secure the concession in case the Fitzgerald concession became void through failure of compliance with the

[2] Ralston's "Venezuelan Arbitration," 1903, pp. 696–706.

term fixed for this purpose. September 9, 1886, the earlier concession was declared non-existent and the Turnbull contract was ratified by the congress. The Manoa Company then became the successor to Fitzgerald's interests and in 1895 asked to be reestablished in his rights, and the President of Venezuela issued a decree in accordance with the Manoa Company's desires. In the fall of the same year the Manoa Company conveyed its entire grant to the Orinoco Company, and in 1901 the government of Venezuela issued a decree stating that all that had been done for the Manoa Company and its successor — the Orinoco Company — since the Turnbull concession, was of no effect and void, and restored the property to Turnbull.

At this juncture, under the protocol of February 17, 1903, the United States and Venezuelan Claims Commission rendered a decision restoring the concession to the Fitzgerald successors — the Orinoco Company, now become the Orinoco Corporation. In addition to the decision of the Claims Commission in its favor, the Orinoco Corporation, in a suit brought against it in a Venezuelan court to test its right to the land, was given a verdict by that court, holding that the first concession being given by authority of congress, could not be revoked by an executive decree, and thereby establishing more firmly than ever the correctness of the claim of the Orinoco Corporation. In 1906, however, despite these decisions, the Venezuelan Government gave four more concessions in the region claimed by the Orinoco Corporation.

In view of this situation the United States requested that the case be submitted again to arbitration, to the Permanent Court of Arbitration at The Hague, to consider and determine:

1. Whether by the wrongful acts of the Venezuelan Government, its officers and agents, the contract rights of the Orinoco Corporation have been destroyed and the value of its concession impaired or destroyed; and

2. Whether injuries have been inflicted upon the Manoa Company (Limited), the Orinoco Company (Limited), and the Orinoco Corporation, or either of them, by wrongful interference with or trespasses upon them while in the partial or entire enjoyment of their contract rights in the Fitzgerald concession; and to award damages accordingly, payable in American gold and bearing interest from the date of the sentence until paid and with power in the tribunal to fix the time and manner of payment of said awards.

(3) *The Claim of the Orinoco Steamship Company.* The Orinoco Shipping and Trading Company (referred to as the "English" company) was organized in London in 1898 and made over all its rights under a concession giving it exclusive use of two mouths of the Orinoco River

for steamship purposes, to the American corporation named the Orinoco Steamship Company. Before this event the English company had acquired the rights of two Venezuelan corporations, the transfer of the franchises of the latter being recognized by the Venezuelan government. In 1900, the Venezuelan government repealed the law closing all mouths but the main one to commerce, thereby destroying the exclusive franchise claimed by the company to the two mouths above noted. The Venezuelan Government was indebted to one of these companies taken over as well as to the English company itself, and compromised those claims by agreeing to pay a certain sum and to extend the franchise of the English company to 1915, six years longer than the original franchise ran, and in 1901 the government repudiated this extension. These two acts severely injured the American company and it turned first to England under the charter of the English company, and then after its assignment to the American company, to the United States for diplomatic aid. An arbitration agreement was finally entered into with Venezuela providing for trial before four commissioners and an umpire. The commissioners disagreed and the umpire, Dr. Barge, was left to decide. Contrary to the terms of the protocol Dr. Barge allowed considerations of a technical nature and the provisions of local legislation to influence his decision, and awarded the complainant company about twenty-eight thousand dollars in place of about one hundred and forty-eight thousand dollars which the company claimed. A reexamination of this decision is now asked by the company, arguing against the claim of Venezuela that the decision of the commission was final, by presenting the fact that the tribunal did not act in accordance with the terms of the protocol which established its jurisdiction.

(4) *The Claim of the New York and Bermudez Company.* In 1883 one H. R. Hamilton obtained from Venezuela a concession or contract for twenty-five years for the exclusive exploitation of asphalt and the uncultivated lands in the state of Bermudez. In addition to the original contract, two additional articles were later agreed upon, and the question as to whether they formed a part of the original contract has caused much dispute, the details of which can not be entered into here. After Hamilton assigned his interest (in 1885) with the approval of the Venezuelan government to the New York and Bermudez Company, the latter company, in order to strengthen its title, secured (in 1888) a right under a mining title to exploit the asphalt lake covered by the concession, for the period of ninety-nine years; and

(also in 1888) secured under a "wild lands title" the fee simple to the land surrounding and covered by the lake. The claim of the company arises out of the repudiation by the Venezuelan government of the Hamilton concession. Under this repudiation based on the ground of non-user, because only the asphalt rights had been taken advantage of, and the right to exploit the surrounding territory had not been availed of, the Venezuelan government prosecuted sequestration proceedings and put in charge a bitter enemy of the company, one A. H. Carner, who worked the mine on a small scale. The company asks to be put in possession again, maintaining that its rights under the two later titles are still good, although the original concession may have expired.

(5) *Claim of the United States and Venezuela Company, or the "Crichfield" Claim.* This claim concerns another of the asphalt concessions. One Guzman in 1900 obtained a concession from acting president Castro, giving him title to an asphalt mine. This concession was sold to G. W. Crichfield, who acted as an agent for an American syndicate, the United States and Venezuela Company. This transfer, as well as the original concession, was validated by the Venezuelan Congress. It was understood that the government would grant Crichfield the right to build a railroad, which was done; and the concession stated that the company should be exempt from taxes except mining dues and stamp fees, should pay no import tax on materials, and should turn the railroad over at the end of fifty years to the Venezuelan government. The railroad was built and the mine started into operation, involving the clearing of rivers and forests, and the employment of 1,000 Venezuelans.

The Venezuelan government has now seen fit to increase the taxation in spite of the clause in the concession saying that future tax laws should not apply to the company. The company has not sought redress in the courts of Venezuela and on that ground Venezuela seeks to evade diplomatic treatment of the claim until the courts have been resorted to. The United States has asserted its position to be that the experience of other claimants, both with the decisions of national and international courts, has been such as to justify the United States in proceeding through diplomatic channels.

The above synopsis shows the status of the various claims at the date when Vice-President Gomez assumed the reins of government after the departure of President Castro. Upon intimation recently conveyed

through the Brazilian government that President Gomez, who as vice-president, was the acting president of Venezuela, and as such was willing to enter into negotiations looking to the settlement of the claims and the reestablishment of diplomatic relations between the two countries, the United States sent the Honorable William I. Buchanan of New York as high commissioner with full powers to negotiate for the settlement of the outstanding difficulties. Mr. Buchanan arrived in Caracas the latter part of December and after weeks of careful, thoughtful, patient discussion succeeded in reaching a settlement upon the cases equally satisfactory it would seem to the honor and dignity of both countries.

Of the five cases it is understood that three were readily settled by Venezuela upon terms satisfactory to both governments. It would seem that Venezuela has admitted the principle contended for in the Jaurett case by the payment to Jaurett of an indemnity for his expulsion. In the Orinoco Steamship Company case Venezuela and the United States agree to submit Barge's decision in the case to arbitration in order that the tribunal of arbitration may determine whether or not the case should be re-arbitrated. Should the tribunal decide that Barge's decision is not properly the subject of re-arbitration, the original decision is to stand. If, on the contrary, the tribunal should decide to reopen the case then the entire case of the Orinoco Steamship Company is to be considered upon its merits and the award of the arbitration tribunal to be final. Both governments agreed to submit the Crichfield case to an arbitration upon its merits. In this latter case there have been no judicial proceedings and Venezuela felt that its submission to arbitration would not in any way question the dignity or validity of national decisions.

The cases of the Orinoco Corporation and the New York and Bermudez Company were more difficult of adjustment because in each of these cases the court of cassation of Venezuela had decided the controversy and Venezuela felt that the submission of these cases upon their merits would necessarily involve disrespect to judgments of its national courts. It was, however, willing to submit the judgment of its courts to arbitration in order to ascertain whether there had been a denial of justice in its judicial proceedings and if the tribunal found a denial of justice then to arbitrate the cases in question upon their merits. The difficulty with this method of procedure was and is that the judgments themselves would have to be submitted to the board of arbitration in order to ascertain whether there had been a denial of justice and it is a mooted question whether the merits of the cases would come before the tribunal in this

form. The United States on the other hand wished to disregard the local decisions and to submit the questions involved in them to arbitration without the embarrassment incident to the examination of the judicial proceedings of Venezuela.

Mr. Root, in presenting this proposition to the government of Venezuela, endeavored to make it clear that it did not involve any sacrifice of dignity, and that a relinquishment of the Venezuelan contention did not involve any sacrifice of honor. He endeavored to make it clear that the United States Government was not coercing. In correspondence with the Venezuelan government he called attention to the fact that the United States has repeatedly submitted to arbitration questions already decided in its own courts, and has confirmed decisions adverse to those of its own courts. The United States and Great Britain have recently agreed to submit to arbitration a number of cases which have been decided by British courts and which are to be examined by arbitration tribunals without regard to the decisions of those courts. The assertion of the finality of decisions of national courts in proceedings against the nation, is, he represented, in its essence a refusal of arbitration. The essential quality of arbitration is the substitution of a tribunal which is international, and therefore unprejudiced, for a tribunal which is national and therefore partial.

Mr. Root submitted to Venezuela a list of cases upon which decisions had been rendered by the Supreme Court of the United States and which questions were afterwards submitted to arbitration by the United States under the British-American Claims Convention, sitting under article XII of the Treaty of Washington. In six of these cases the international tribunal decided adversely to the decision of the Supreme Court of the United States, and its judgment was accepted by this government. In six cases the international tribunal decided in accordance with the decision of the Supreme Court of the United States and Great Britain accepted the judgment without question, which illustrates the general policy of the United States as well as that of Great Britain to freely submit on their merits, to impartial international arbitration, questions involving the decisions of its highest tribunal.

Mr. Root further stated that in a protocol no mention should be made of submitting court decisions to review, but that the protocol should speak of submitting to international decisions cases in respect to which there have already been decisions of the courts. This, he said, will be much easier for Venezuela and is in accordance with the practice of the

great powers. For example, in none of the cases where the United States has submitted cases already decided have the decisions of the courts been treated as being under review, but the cases have been submitted on their merits for a new decision, notwithstanding the previous decisions of the courts. The distinction drawn by Mr. Root between submitting a decision of a court to review and submitting the question involved in the decision of a court, is the distinction between a court of appeal which passes upon a decision, and the arbitration of a question involved in a previous decision. In the first case, by a submission of a judgment to review the sovereignty of the nation is involved, because it creates over and above its courts an international tribunal to which an appeal can be taken from a national to an international tribunal at any time, whereas, in the method proposed by Mr. Root national sovereignty and the finality of national decisions is not involved because the questions are by agreement of the two powers submitted to arbitration on their merits without transmitting the docket from an inferior to a superior jurisdiction.

Venezuela declined to accept Secretary Root's proposition because it believed it against its honor and dignity to submit to international arbitration questions which have already been passed upon by its courts. Venezuela is willing, however, to submit to international arbitration its judicial decisions in order, by examination of such decisions by a court selected from the Hague panel, to determine whether there has or has not been a denial of justice in the proceedings had in the Venezuelan courts. If it shall appear that there has been a denial of justice, then Venezuela will consent that the questions shall be examined upon their merits, and will submit to the final decision of the tribunal. If, on the contrary, a disinterested tribunal, selected from The Hague, shall consider the proceedings so regular that there has been no denial of justice, the decisions of the courts of Venezuela shall be considered as final and the questions in controversy shall be dismissed.

It would seem that the view of Secretary Root is more consistent with national dignity and honor than is the view of Venezuela. Mr. Root regards the judgment of the supreme court of a country as so final and entitled to such credit within the country, that he is unwilling that the judgment as such be submitted to reexamination by any international tribunal.

The case of the Orinoco Corporation is to be submitted to arbitration in such a way that the judicial proceedings had in Venezuelan courts

as well as the legislative and executive acts of Venezuela will be submitted to the tribunal in order to ascertain whether there has been committed in any or all of them manifest injustice. The tribunal is to be composed of three members selected from the permanent panel of the Hague court, one by each nation, and the two arbiters thus chosen are to select from the same court a third. It is wisely provided that none of these arbiters shall be a citizen of the United States or of Venezuela, and no member of the Hague court shall appear as solicitor for either of the two parties to the controversy. Within six months the governments are to send the names of the judges selected by each and within eight months the presentation of the claims must be made. Provision is made in the protocol for direct settlement between the Orinoco Corporation, the United States and Venezuela Company, and the Venezuelan Government, provided such settlement is made within five months and provided further it meets with the approval and gains the consent of the United States government. It is not unlikely that the two cases will be settled out of court. Should negotiations fail there will therefore be three cases submitted to arbitration.

The case of the New York and Bermudez Asphalt Company has been settled directly between the company and the government and no mention of the case is made in the protocol. The private agreement reached between the government and the New York and Bermudez Asphalt Company is set forth in eight articles. In the first and second the company recognizes the annulment of the Hamilton concession, and accepts the sentence of the courts of Venezuela regarding the claim for damages for aiding the rebellion. In the third article Venezuela agrees to reduce the amounts in which the company has been condemned by the aforesaid sentences. As a consequence, the company shall pay to the nation the amount of 300,000 bolivars (about $60,000) in cancellation of the obligations which the company contracted because of the aforementioned sentences. In Article 4 Venezuela declares that the company possesses over the Guanoco mine a mining title, dated December 7, 1888, as well as title to certain wild lands in which the mine lies. By the terms of Article 5 the government returns to the company the possession and the use of the Guanoco mine and other properties, and concedes to the company free transit and free importation of tools and machinery. The company recognizes the direct domination of Venezuela over the aforesaid mine. In Article 6 the company agrees to sell to Venezuela such Guanoco asphalt as it may need for its public works at a reduction of 25 per cent from

the current price. Article 7 provides that the company shall pay to the national government a tax of 4 bolivars for each ton of asphalt which it may export, without having to pay any other tax; but it is understood that the annual total of this tax shall never be less than the sum of 100,000 bolivars ($20,000). Article 8 says: "In the aforesaid terms all the questions and differences between the two parties up to to-day are settled, without any rights for subsequent claims in regard to them." In conclusion, both parties to the agreement ask the court immediately to give necessary orders for the sequestrated property of the company to be turned over to it.

As the American minister was withdrawn from Venezuela by reason of the failure to consider the various grievances of American citizens, the adjustment of these differences paves the way for resuming the diplomatic relations which were unfortunately suspended. Minister Russell will return to his post, a diplomatic representative will be accredited to the United States, and it is to be hoped that the relations of the two countries will be in future more satisfactory than in the past, because by an interchange of views and an adjustment of difficulties, suspicion has given way to confidence, and both countries are not only willing but desirous to maintain the most cordial relations and good understanding.

A NEW SULTAN IN MOROCCO

The internal commotions in Morocco which led to an assembling of a conference at Algeciras for settling the international status of Morocco, and the adoption of the Algeciras Act[1] of April 7, 1906, the rebellion of Mulai Hafid resulting in the overthrow of the former sultan, and the recognition of the new one, after considerable difficulty and friction between the powers, especially France and Germany, as evidenced by the joint notes of the powers,[2] the settlement of the controversy between France and Germany arising out of the Casablanca incident,[3] have been fortunately terminated, and the agreement between France and Germany concerning the commercial interests of Germany and the political interests of France in Morocco eases the strained international relations caused by the internal disorders of Morocco and re-

[1] See Supplement, *1*:47.
[2] See Supplement, this issue, p. 103.
[3] See JOURNAL for January, 1909, p. 176.

moves a source of future trouble between the powers interested in the North African state.

There are two powers preeminently concerned with the future of Morocco, namely, France and Spain. The acquisition of Algeria has made France a neighbor, and it is but natural to suppose that France, either influenced by the position of Algiers and the desire to maintain law and order in the department, or moved by a desire to include Morocco within its sphere of influence should jealously watch the trend of affairs. In the next place the geographical situation of Spain and the foothold which it has in Morocco cause Spain to watch with jealous eyes the progress of events in the neighboring country. An agreement was reached between Great Britain, likewise interested in Morocco, and Spain, dated May 16, 1907;[4] between France and Spain, dated May 16, 1907;[5] and between Great Britain and France, dated April 8, 1904.[6] The agreement between Germany and France (February 9, 1909) the material portion of which follows, likewise recognizes the political interests of France while safe-guarding the commercial relations of Germany:

> The Government of the French Republic and the German Imperial Government, actuated by an equal desire to facilitate the execution of the Act of Algeciras, have agreed to define the significance which they attach to its clauses with a view to avoiding any cause of misunderstanding between them in the future.
>
> Consequently, the Government of the French Republic, wholly attached to the maintenance of the integrity and of the independence of the Shereefian Empire, decided to safeguard economic equality there, and accordingly not to impede German commercial and industrial interests, and the German Imperial Government, pursuing only economic interests in Morocco, recognizing at the same time that the special political interests of France are closely bound up in that country with the consolidation of order and of internal peace, and resolved not to impede those interests, declare that they will not prosecute or encourage any measure calculated to create in their favour or in favour of any power whatsoever an economic privilege, and that they will endeavour to associate their nationals in business for which these may be able to obtain contracts (*l'entreprise*).

While this treaty may be distasteful to the element in Germany which wishes the acquisition of foreign naval bases and the political supremacy of Germany in Morocco, the understanding reached by the two powers will be exceedingly gratifying to those who believe that

[4] See Supplement, *1*:425.
[5] See Supplement, *1*:425.
[6] See Supplement, *1*:6.

France and Germany are enemies accidentally, not inherently. A favorite policy of Bismark was to encourage Austria to extend its influence to the south-east thus relieving Germany from the field of Austrian activity. It would seem equally statesmanlike for Germany to encourage France to compensate itself in the Mediterranean far from the Rhine, for the loss of territory consequent upon the unfortunate Franco-German war.

THE BALKAN SITUATION

In an Editorial Comment in the October issue of the JOURNAL (1908)[1] it was pointed out that the proclamation of Bulgarian independence on October 5, 1908, that the permanent incorporation of Bosnia and Herzegovina with Austria-Hungary, and the substitution of Greek for Ottoman authority in Crete, constituted a violation of the Berlin treaty of July 13, 1878, which has hitherto formed the basis of law and order in the Balkan peninsula. It was also stated that the annexation of Eastern Roumelia to Bulgaria violated article 13 of the treaty of Berlin, and it was stated that as no one power could change the provisions of a treaty without the consent of the signatories it was probable that the conference of interested powers would meet to consider the situation and recognize formally the changes which had taken place.

A conference has not assembled but the foreign offices of Europe have been busy exchanging notes and views. M. Isvolsky, minister of foreign affairs of Russia, has visited the capitals of Europe and it appears that the difficulties are to be settled by an arrangement satisfactory to the signatories of the treaty of Berlin without a formal conference of the powers.

The two great questions agitating the powers and at times threatening the peace of Europe relate to the compensation to be awarded Turkey for the recognition of Austro-Hungarian sovereignty in Bosnia and Herzegovina, and the conditions upon which the Porte is to recognize the independence of Bulgaria. Without going into the events leading to the Russo-Turkish War it is sufficient to say that the Treaty of Berlin placed the provinces of Bosnia and Herzegovina under Austro-Hungarian occupation and administration. No term was placed to the occupation and administration of the provinces but whatever the

[1] 2:864.

ulterior designs of Austria-Hungary may have been at the conclusion of the treaty of Berlin, the expressions used, namely, "occupation and administration" do not amount to a grant or cession of territory, and however prolonged the occupation or administration may or might be it would nevertheless be, in contemplation of law, temporary. Each succeeding year, however, rendered the evacuation of the provinces less probable, if not more difficult, and reduced Turkish sovereignty to a claim of right. While article 25 of the treaty of Berlin did not subject Novibazar to Austro-Hungarian influence, the article reserved to Austria-Hungary "the right of keeping garrisons and having military and commercial roads in the whole of this part of the ancient vilayet of Bosnia," and that "to this end the governments of Austria-Hungary and Turkey reserved to themselves to come to an understanding on the details." Within a year of the treaty of Berlin Austria-Hungary exercised the reservation and garrisoned Novibazar. Austria-Hungary, evidently, regarded its presence in Novibazar as of a temporary nature for upon proclaiming the annexation of Bosnia and Herzegovina, the dual monarchy withdrew its troops from Novibazar, thus returning it to Turkish control. While this action on the part of Austria-Hungary may have simplified the problem, it did not solve it. The question still remained upon what terms would Turkey recognize the severance of Bosnia and Herzegovina from its temporal domain. After negotiation extending over several months it seems probable that an agreement has been reached between the two counties by the terms of which Austria is to pay Turkey 2,500,000 Turkish pounds, in instalments within a period of two years; that upon payment of the total sum a commercial treaty will come into force and that Austria-Hungary proclaims its protectorate over the Albanian Catholics. With the acceptance of this proposal the Bosnia-Herzegovina difficulty will be settled, at least for the present.

The difficulty with Bulgaria has been at times so acute as to threaten a resort to arms. The situation in Bulgaria has been complicated by the fact that while the treaty of Berlin in its first article constituted Bulgaria an autonomous and tributary principality under the suzerainty of the Sultan, Bulgaria has persistently and continuously claimed and exercised the rights of a sovereign state, and, as is well known, in 1885 annexed Eastern Roumelia which by virtue of article 13 of the Treaty of Berlin was to remain "under the direct political and military authority of his Imperial Majesty the Sultan, under consideration

of political autonomy." By the annexation of Eastern Roumelia, Bulgaria violated the treaty of Berlin, and by its proclamation of independence on October 5, 1908, a still further violation of the treaty was committed. It must be said, however, that the claims of Turkey upon Bulgaria existed in theory, for in fact Bulgaria has for years past been independent. For example, it attended the Second Hague Conference in 1907 as an independent sovereign state on terms of equality with the other members of the conference, presented projects, voted as did the others, and signed the convention in its own name and in its own right.

Theoretically, however, Bulgaria was not independent. According to the conventional law of Europe it was and is, until its independence is recognized, legally dependent upon Turkey. It is not to be supposed, however, that the development of the past thirty years will be checked and that Bulgaria would be subjected even nominally to Turkish control, but it is equally obvious that Turkey would be unwilling to renounce even a theoretical claim of right without compensation. Bulgaria has been willing to purchase the independence it claims and asserts, and Turkey is not unwilling to recognize the actual state of affairs. The difficulty exists in the fact that while Turkey is willing to accept one hundred and twenty-five millions of francs, in full satisfaction of its claims, Bulgaria is willing to pay but eighty-two millions. A dead-lock seemed to have arisen when through the ingenuity of M. Isvolsky, minister of foreign affairs for Russia, a proposal was made which has received the unqualified approbation of Bulgaria as well as of the signatories of the treaty of Berlin.

It appears that Turkey is indebted to Russia by reason of the Russo-Turkish War in the amount of some twenty-two million pounds sterling, payable in seventy annual instalments. Russia agrees to cancel a sufficient number of instalments to enable Turkey to borrow the sum demanded from Bulgaria, namely one hundred and twenty-five millions of francs, and Bulgaria undertakes to reimburse Russia to the extent of eighty-two million francs in the form of an annual payment of about five millions for interest and sinking fund. As the London *Times* in its issue of February 2, 1909, points out, "The arrangement has the further advantage of eliminating financial control of Bulgaria's finances, without which she could not have raised a war loan abroad, while it will not impose any immediate heavy loss on the Russian exchequer. Instead of the eight million francs received annually from

the Ottoman bank Russia will for the next sixteen (eighteen?) years, draw five million francs from Bulgaria."

Settlement upon these terms will be a great diplomatic triumph for Russia which thus enables Turkey to enforce its demands without loss of prestige, enables Bulgaria to purchase its independence upon its own terms, at the sacrifice on the part of Russia of a part of a debt created for the independence of the Balkan states. M. Isvolsky's project is as generous as it is farsighted and statesmanlike. The complications of the Balkan situation are likely to be eliminated without a trace of ill-feeling to the satisfaction of all the parties in interest.

THE REMISSION OF A PORTION OF THE CHINESE INDEMNITY [1]

In President's Roosevelt's message of December 3, 1907, he asked for authority to reform the Chinese indemnity, paid to the United States for the compensation of losses arising out of the Boxer troubles of 1900, by remitting and cancelling the obligation of China excess above the sum of $11,655,492.69. The indemnity allotted to the United States by the final protocol signed at Peking, September 7, 1901, amounted in round numbers to over $20,000,000, and of this sum China had paid to January 1, 1907, a little over $6,000,000. The desire of the United States was to secure compensation for losses actually suffered by its citizens in their business interests. It was not in any sense of the word in the nature of punishment or exemplary damages, exacted for a definite purpose. It was as just as it was generous that the United States should return the unexpended balance of the indemnity for its retention would be inconsistent with the purpose of the indemnity as understood by the United States and would properly be a cause of irritation to China by making its misfortunes a source of profit to a foreign government. The following quotation from the president's message places the proposed action of the United States in its proper light.

> It was the first intention of this government, at the proper time, when all claims had been presented and all expenses ascertained as fully as possible, to revise the estimates and account, and as a proof of sincere friendship for China voluntarily to release that country from its legal liability from all payment in excess of the sum which should prove to be necessary for actual indemnity to the United States and its citizens.

[1] See Vol. 2, p. 160.

This nation should help in every practical way in the education of the Chinese people, so that the vast and populous Empire of China may gradually adapt itself to modern conditions. One way of doing this is by promoting the coming of Chinese students to this country and making it attractive to them to take courses at our universities and higher educational institutions. Our educators should, so far as possible, take concerted action toward this end.

On December 28, 1908, the President of the United States, acting upon the advice of Elihu Root, Secretary of State, issued the following executive order:

Pursuant to the authority of the joint resolution of Congress to provide for the remission of a portion of the Chinese indemnity, approved May 25, 1908, I hereby consent to a modification of the bond for $24,440,778.81, dated December 15th, 1906, received from China pursuant to the protocol of September 7, 1901, for indemnity against losses and expenses incurred by reason of the so-called Boxer disturbances in China during the year 1900, so that the total payment to be made by China under the said bond shall be limited to the sum of $13,655,492.69 and interest at the stipulated rate of four per centum per annum, and that the remainder of the indemnity to which the United States is entitled under the said protocol and bond be remitted as an act of friendship, such payment and remission to be made at the time and in the manner hereinafter provided, which I deem to be just, that is to say:

In accordance with the plan of amortization annexed to the original indemnity bond, the amounts payable hereafter by China to the United States would be as set forth in the schedule annexed hereto marked "Schedule A," and identified by the signature of the Secretary of State.

I have caused an account to be made by the Treasury Department in which the payments already made under the original bond are credited as against a debt of $13,655,492.69, with interest at four per centum per annum beginning July 1, 1901, in lieu of the original sum specified in the bond, and I find that after such credits, and including in such credits the sum of $85,223.04, which it is assumed will be paid on the 1st of January, 1909, there will remain on that day to be paid and retained by the United States, in satisfaction of the sum of $13,655,492.69 and interest thereon, the sum of $9,644,367.60.

It also appears by the said new account that the payment to and retention by the United States of the sums specified in the paper hereto attached, marked "Schedule B," and identified by the signature of the Secretary of State, will satisfy the principal and interest of the said sum of $9,644,367.60 by the end of the period contemplated in the original plan of amortization. And I direct that after the said 1st day of January, 1909, from the several payments made under the said bond of December 15, 1906, in accordance with "Schedule A," there be retained and paid into the Treasury of the United States only the sums specified in "Schedule B;" and that the remainder of the said several payments so made by China in accordance with "Schedule A" over and above the sums specified by "Schedule B" be returned by endorsing back the drafts therefor, or otherwise, and thus remitted to the Government of China. The sums to be so returned in

each year will be as stated in the paper hereto attached marked "Schedule C," identified by the signature of the Secretary of State.

The provision contained in the original bond for an adjustment of interest because payments are made monthly instead of semi-annually will continue to be applicable to the payments of the sums specified in "Schedule B."

SCHEDULE A.

Year	Amount due yearly, payable half yearly	Monthly installments	Year	Amount due yearly, payable half yearly	Monthly installments
1909	$1,022,683.66	$ 85,223.64	1925	$1,329,784.75	$110,815.40
1910	1,022,683.66	85,223.64	1926	1,329,784.76	110,815.40
1911	1,080,787.54	90,065.63	1927	1,329,784.75	110,815.40
1912	1,080,787.54	90,065.63	1928	1,329,784.76	110,815.40
1913	1,080,787.53	90,065.63	1929	1,329,784.75	110,815.40
1914	1,080,787.53	90,065.63	1930	1,329,784.76	110,815.40
1915	1,264,582.18	105,381.85	1931	1,329,784.75	110,815.40
1916	1,329,784.76	110,815.40	1932	1,919,967.11	159,997.26
1917	1,329,784.76	110,815.40	1933	1,919,967.10	159,997.26
1918	1,329,784.76	110,815.40	1934	1,919,967.10	159,997.26
1919	1,329,784.75	110,815.40	1935	1,919,967.11	159,997.26
1920	1,329,784.76	110,815.40	1936	1,919,967.09	159,997.26
1921	1,329,784.75	110,815.40	1937	1,919,967.09	159,997.26
1922	1,329,784.75	110,815.40	1938	1,919,967.11	159,997.26
1923	1,329,784.75	110,815.40	1939	1,919,967.10	159,997.26
1924	1,329,784.76	110,815.40	1940	1,923,374.12	160,281.18

SCHEDULE B.

Year	Principal to be retained	Interest to be retained	Total payment to be retained
1909	$153,814.06	$385,774.70	$539,588.76
1910	159,966.62	379,622.14	539,588.76
1911	166,365.29	373,233.47	539,588.76
1912	173,019.90	366,568.86	539,588.76
1913	179,940.70	359,648.06	539,588.76
1914	187,138.32	352,450.44	539,588.76
1915	194,623.86	344,964.90	539,588.76
1916	202,408.81	337,179.95	539,588.76
1917	210,505.16	329,083.60	539,588.76
1918	218,925.37	320,663.39	539,588.76

SCHEDULE B—Continued.

Year	Principal to be retained	Interest to be retained	Total payment to be retained
1919	$227,682 38	$311,906.38	$539 588 76
1920	236,789.68	302,799.08	539,588 76
1921	246,261.27	293,327 49	539 588.76
1922	256,111.72	283,477.04	539 588.76
1923	266,356.19	273,232.57	539,588.76
1924	277,010.44	262,578.32	539,588.76
1925	288,090.85	251,497 91	539,588 76
1926	299.614.49	239,974.27	539,588.76
1927	311,599.07	227,989.69	539,588.76
1928	324,063.03	215,525.73	539,588.76
1929	337,025.56	202,563.20	539,588.76
1930	350,506.57	189,082.19	539,588 76
1931	364,526.84	175,061.92	539,588.76
1932	379,107.92	160,480.84	539,588.76
1933	394,272.22	145,316.54	539,588.76
1934	410,043.11	129,545.65	539,588.76
1935	426,444.84	113,143.92	539,588.76
1936	443,502.64	96,086.12	539,588.76
1937	461,242.74	78,346.02	539,588.76
1938	479,692.45	59,896.31	539,588.76
1939	498,880.14	40,708.62	539,588.76
1940	518,835.36	20,753.40	539,588.76

SCHEDULE C.

Year	Amount remitted yearly	Year	Amount remitted yearly
1909	$483,094.90	1925	$790,195.99
1910	483,094.90	1926	790,196.00
1911	541,198.78	1927	790,195.99
1912	541,198.78	1928	790,196.00
1913	541,198.78	1929	790,195.99
1914	541,198.78	1930	790,196.00
1915	724,993.42	1931	790,195.99
1916	790,196.00	1932	1,380,378.35
1917	790,196.00	1933	1,380,378.34
1918	790,196.00	1934	1,380,378.34
1919	790,195.99	1935	1,380,378.35
1920	790,196.00	1936	1,380,378.43
1921	790,195.99	1937	1,380,378.43
1922	790,195.99	1938	1,380,378.35
1923	790,195.99	1939	1,380,378.34
1924	790,196.00	1940	1,380,378.36

On July 11, 1908, the American Minister informed the Chinese Government of the action of the United States and in acknowledging on July 14, 1908, the note of the American Minister, the Chinese Government stated:

The Imperial Government, wishing to give expression to the high value it places on the friendship of the United States, finds in its present action a favorable opportunity for doing so. Mindful of the desire recently expressed by the President of the United States to promote the coming of Chinese students to the United States to take courses in the schools and higher educational institutions of the country, and convinced by the happy results of past experience of the great value to China of education in American schools, the Imperial Government has the honor to state that it is its intention to send henceforth yearly to the United States a considerable number of students there to receive their education. The board of foreign affairs will confer with the American minister in Peking concerning the elaboration of plans for the carrying out of the intention of the Imperial Government.

In a supplemental letter dated the same day the Chinese Foreign Office outlined more fully the purpose to which the remitted balance of the indemnity is to be devoted:

Referring to the dispatch just sent to your excellency, regarding sending students to America, it has now been determined that from the year when the return of the indemnity begins 100 students shall be sent to America ever year for four years, so that 400 students may be in America by the fourth year. From the fifth year and throughout the period of the indemnity payments a minimum of 50 students will be sent each year.

As the number of students will be very great there will be difficulty in making suitable arrangements for them. Therefore, in the matter of choosing them, as well as in the matter of providing suitable homes for them in America and selecting the schools which they are to enter, we hope to have your advice and assistance. The details of our scheme will have to be elaborated later, but we take this occasion to state the general features of our plan, and ask you to inform the American Government of it. We sincerely hope that the American Government will render us assistance in the matter.

On August 3, 1908, Mr. Root wrote to the American Minister at Peking and enclosed the proposed regulations for the students to be sent to America:

PROPOSED REGULATIONS FOR THE STUDENTS TO BE SENT TO AMERICA.

I. GENERAL STATEMENT.

The students to be sent to America are to be supported out of the indemnity fund remitted by the United States. It is proposed to memorialize the Throne fixing the number of students to be sent abroad, with a statement of the general

arrangements made for them, and at the same time to notify the American minister.

The board of foreign affairs will be responsible for the establishment of the training schools and the appointment of the superintendent of students.

The board of education will be responsible for the examination of the students after their graduation, as the board of foreign affairs may invite the board of education.

The officials appointed by the board of foreign affairs and the American legation shall be jointly responsible for the selection of the students who are to be sent to America, and for their distribution in America: educational institutions.

II. The General Purpose.

The aim in sending students abroad at this time is to obtain results in solid learning. Eighty per cent. of those sent will specialize in industrial arts, agriculture, mechanical engineering, mining, physics, and chemistry, railway engineering, architecture, banking, railway administration, and similar branches, and 20 per cent. will specialize in law and science of government.

III. Qualification of Students.

The requirements will be —

(*a*) General intelligence.

(*b*) Good character.

(*c*) Good health.

(*d*) Respectable social position.

(*e*) Suitable age.

(*f*) Knowledge of Chinese sufficient to write an essay of several hundred characters.

(*g*) General knowledge of Chinese classical literature and history.

(*h*) Knowledge of English sufficient to enable the student to enter an American university or technical school.

(*i*) The completion of a preparatory course in general studies.

IV. The Method of Nomination of Candidates.

The board of education will choose the most promising students from all the schools and present them for examination. The board of foreign affairs will also call for applications. Students of both these classes must be fully up to the required standard or they will not be accepted as candidates. (Detailed regulations will be drawn up later.)

V. The Examination and Choice of Students.

Officials appointed by the board of foreign affairs and one official appointed by the American legation will consult together and report to the board the detailed method of procedure. There shall be three tests:

(*a*) Candidates must be inspected as to their physical condition by western trained physicians.

(*b*) They must pass in Chinese.

(*c*) They must pass in English and general branches. (Detailed regulations will be issued later.)

VI. The Training School.

The board of foreign affairs will establish a training school for students going to America (or branch schools will be established at Tientsin, Hankow, and Canton for the convenience of students from the different provinces). All the accepted candidates will enter this school or schools. Those sent out the first year will be trained for six months and those sent thereafter will be trained for one year. During this time the character and ability of the students will be closely inspected and only those found satisfactory will be sent abroad. Those found unsuitable will be rejected. (Detailed regulations will be issued later.)

VII. The Superintendence of the Students Abroad.

At Washington, Chicago, or some other suitable place centrally located the office of the general superintendent will be established. Some one who has graduated from an American university and who has a reputation for ability will be appointed superintendent of students, and four or five assistants will be appointed to attend to the placing of the students, to their finances, and to inspect their studies. These will make regular reports. (Detailed regulations will be issued later.)

VIII.

After the students have completed their courses of study and obtained their diplomas they will be presented by the board of foreign affairs to the board of education to be examined according to the regulations, and they will receive rank as may be determined by the board of education.

The documents regarding this remarkable incident tell their own story and have been set forth without comment. They show that the Americans, whom Europe condemns as the most materialistic and practical people, are nevertheless more idealistic than the European nationalities from whom they are supposed to have derived their inherited traits. At the time of going to press we are not informed that any power entitled to indemnity under the protocol of September 7, 1901, has either proposed or contemplates the remission of the whole or any part of the indemnity exacted from China in a crisis in her internal and foreign relations.

NEW POSTAL REGULATION WITH GERMANY

In the editorial comment for October (*3*:849) attention was called to the fact that penny postage had been introduced between Great Britain and the United States, and the effect of such reduction upon

the intercourse between foreign nations was pointed out. An agreement between the Postmaster General representing the United States and German postal officials was recently entered into[1] by virtue of which a uniform rate was introduced of two cents an ounce for letters mailed in the United States and ten pfennigs for each twenty grams for letters mailed in Germany, provided, however, that such letters be sent directly to the contracting countries. Letters between the two countries transshipped and forwarded via England and France pay according to the Postal Union rules. The fact that two postage rates thus exist for letters interchanged with Germany is likely to cause some difficulty and confusion unless the rules and regulations issued by the Postoffice Department are carefully observed. The material portions of the order of December 31, 1908, are therefore quoted:

1. Letters specially addressed by the senders are to be dispatched and rated for postage in accordance with said special addresses, except that letters prepaid or short-paid at the rate of postage for direct ocean transportation, or at a less rate, shall not be dispatched by other than direct ocean transportation.

2. Letters not specially addressed by the senders are to be dispatched as follows:

(*a*) In the event of prepayment, either in full or in part, when the amount of the postage prepaid is in excess of the rate of postage for direct ocean transportation, they are to be dispatched by the most rapid route, that is, via England or France; otherwise, by means of direct ocean transportation.

(*b*) In the event of being wholly unprepaid they are to be always dispatched by means of direct ocean transportation.

(*c*) In the cases under "*a*," where the amount of postage prepaid is not sufficient for the route which it indicates shall be employed, double the amount of the deficiency of the postage for such route shall be collected.

3. Letters which should be dispatched by means of direct ocean transportation, according to directions 1 and 2, and are erroneously dispatched by another route by a post office of the country of origin, are not subject, when the postage prepaid is sufficient for the direct ocean route, to the payment of any additional postage, and in any other case they are to be rated up only at the postage rate for direct ocean transportation.

The new agreement does not provide for a corresponding reduction in the rate for post cards, which remains two cents per card as heretofore.

It is to be hoped that the agreements already reached with Great Britain and Germany are but the precursors of a more general reduction of international postal rates.

[1] Signed in America January 9, and in Germany January 26, but taking effect by mutual agreement on January 1, 1909.

"POLITICAL OFFENCE" IN EXTRADITION TREATIES

From whatever standpoint we approach the question of extradition we see in it the recognition of the solidarity of the nations, because the right of extradition necessarily presupposes that nations are so interested in maintaining the law and order within the family of nations that they agree to surrender fugitives seeking refuge within their boundaries to the home governments in order that the violations of the law may be properly punished. The right of asylum is thus vanishing from international law and in its place we are recognizing a duty, conventional in form, to aid in the administration of justice. It may be that the extradition of a fugitive from justice is a moral duty, an opinion not countenanced by the weight of authority, but the acceptance of the duty by formal convention binds the nations to surrender, the failure to do which taxes them with a violation of treaty obligations. The conventional nature of the duty is seen in the fact that the extradited fugitive can only be tried for the offense for which he was surrendered and he may not be surrendered for an offense not specified in the treaty of extradition. There can be no objection to the surrender of fugitives charged with the grosser crimes, although it may well be that states are unwilling to surrender their own subjects and citizens for crimes alleged to have been committed in foreign parts. A criminal is none the less a criminal because he is a subject or citizen, but national feeling may well regard him in such a different category as to prevent his surrender.

A very different question is raised when it is proposed to surrender fugitives whose sole offense has been of a political character, that is to say, fugitives who for political purposes, such as to overthrow the government and substitute another in its place, or to modify existing governments, have resorted to force, committed acts of violence, and in not a few cases, crimes of the most serious character. We naturally sympathize with one whose act was for the public good however mistaken his judgment, who exposed himself to the loss of life and property without any immediate hope of profit or gain. It is, however, necessary to define the nature of political offense, lest we include in its protection questionable characters who have taken advantage of disorder and commotion to commit crime, and whose act was neither in furtherance of nor connected with a political movement. It is all the more necessary to determine the nature of a political crime because

many of the treaties exclude "political offences" from extradition without attempt to define them.[1] This is not to be wondered at, because it is very difficult to state categorically and in the abstract what is or is not a political offense. As Lord Denman said in the *Castioni* case (1 Q. B. 149):

"I do not think it necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. * * * The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."

And in the same case Mr. Justice Hawkins said:

"I can not help thinking that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time, one can not look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for purposes of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over."

Whether an act is political or not is therefore largely a matter of interpretation and must be considered in the light of facts and circumstances attending its commission.

It may be questioned whether the progress of constitutional and representative government will not cause political offences to be looked upon with less favor than formerly, and that uprisings against a well-regulated and orderly government will deprive the fugitive of the sympathy lavished upon him not many years ago when constitutional government was being forced from unwilling hands. It is not too much to say that crimes committed by anarchists, by those to whom organized government is repulsive may be excluded from the category of non-extraditable offences, and that the assassination of sovereigns of mon-

[1] See Supplement to this issue, pp. 144 et seq.

archial countries and chief executives of republican states,[2] will no longer enjoy the immunity to which political fugitives are entitled.

The recent trial of the Russian Rudowitz in Chicago and the refusal to extradite, for the murder in Russia of a fellow-citizen and two defenceless women, accused of betraying revolutionary plots to the Russian government, may well give us pause, lest in our sympathy with alleged political offenders we place a premium upon the commission of unspeakable atrocities. The exclusion of assassins of heads of states and anarchists from the benefit of political offences leads to the conclusion that some limitations must be imposed upon the immunity previously granted and it may be that a reexamination of political offences in the light of experience and practice may suggest further limitations so as to separate ordinary crime from the pretence of political activity. A fugitive who has really committed a political crime should not be surrendered, but international justice and comity demand that an ordinary crime should not be invested with a political character for the sole purpose of defense. The question is as complicated as it is delicate, but a reexamination of the essentials of a political offence seems necessary in order that a right of asylum may not be abused and that we may not extend protection to unworthy persons.

THE NEWFOUNDLAND FISHERIES QUESTION

The controversy between the United States and Great Britain in relation to the Northeastern or Newfoundland Fisheries, which has been a subject of diplomatic negotiation for nearly seventy years, is to be finally settled by a submission to the Permanent Court at The Hague in accordance with the general treaty of arbitration between the two powers concluded April 4, 1908.[3] On January 27th[4] last Secretary of State Root and Ambassador Bryce signed a special agreement as provided by the treaty determining the constitution of the tribunal and reciting the questions to be decided.

The interpretation of the language of article I of the treaty of October 20, 1818, is the subject which has been the cause of difference between the countries and which is to be judicially determined. The text of the article is as follows:

[2] See articles quoted in Supplement from treaties with the following countries: Belgium, p. 149; Brazil, p. 147; Denmark, p. 149; Guatemala, p. 150; Haiti, p. 144; Mexico, p. 147; Portugal, p. 163; Russia, p. 145; Spain, p. 150.

[3] See Supplement, 2:298.

[4] See supplement to this issue, p. 168.

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straights of Belleisle and thence northwardly indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company: and that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

It will be observed that by this treaty American fishermen were excluded from taking fish in waters within three marine miles of the British colonial coasts except along southern and western Newfoundland, Labrador, and the Magdalen Islands; and that they were also prohibited from landing on the coasts to cure and dry fish except on the Labrador coast and on a small strip of the southern shore of Newfoundland. The American fishing vessels were, however, permitted to enter the prohibited coastal waters for certain purposes, namely, to find shelter, to repair damages, and to procure wood and water, but these privileges were to be exercised under such restrictions as were necessary to prevent their abuse.

The first dispute concerning the treaty arose about twenty-five years after the signature through the seizure by Nova Scotia revenue vessels of American craft, which were claimed to have taken fish within the three-mile limit, a charge denied by the Americans. The question in

controversy was: upon what basis was the prohibited belt of marginal sea to be fixed? In the diplomatic correspondence which followed the British government asserted that the words of the treaty, "coasts, bays, creeks, or barbours" determined that the line, from which the three miles were to be measured, was such that it crossed the entrance of every bay regardless of its width. This the United States denied, claiming that the language referred only to bays, the width of which did not exceed six marine miles.

In 1854 the controversy, which had been dragged out by ingenious arguments upon both sides, came for a time to an end by the reciprocity treaty of that year which gave to the fishermen of the United States and the British colonies mutual privileges of resort to all coastal waters. With the expiration of that treaty in 1866 the question again arose, but was quieted for a few years by a system of licenses granted to American fishermen by the colonial governments. However, it shortly became a cause of irritation through the renewal of the Canadian policy of making seizures, but the Treaty of Washington (1871) ended the difficulty by reestablishing reciprocal trade and fishing privileges. Upon the expiration of that last venture in reciprocity between the United States and its northern neighbors, the colonial authorities commenced once more to make seizures, and the diplomats at Washington and London attempted to reach a settlement by a new agreement. The Bayard-Chamberlain treaty of 1888 was negotiated, but it failed to receive the assent of the United States Senate. Two years later Secretary Blaine and Honorable Robert Bond of Newfoundland came to an agreement in the form of a reciprocity convention, which was to have settled the dispute so far as the Newfoundland fishery was concerned. Canada, however, not being included in the treaty and fearing that it would interfere with its plan of reciprocity with the United States, objected to the ratification and as a result the British government declined to sanction the agreement.

For twelve years after this failure the American fishermen prosecuted their trade without interruption, but Newfoundland being specially desirous of a reciprocity agreement with the United States, Sir Robert Bond made a second visit to Washington and prepared with Secretary Hay a treaty in relation to the fisheries and reciprocal trade, which was signed November 8, 1902; but to it the Senate never gave its assent.

With the failure of the Hay-Bond treaty the attitude of Newfoundland toward the American fishermen changed. As a result new ques-

tions were raised as to the fishing rights of the United States in the coastal waters of Newfoundland. The colonial government adopted fishery regulations as to the methods and times of taking fish, together with other restrictions, claiming that they applied to Americans as well as to their own people. These the Americans considered burdensome and as discriminating against them in favor of the local fishermen. The government also adopted certain customs regulations and applied them to American fishing vessels, which, it was alleged, interfered materially with the exercise of their fishing rights. Canada had also claimed that fishing vessels of the United States resorting to the bays and harbors of the Dominion for shelter and repairs should enter and clear at custom houses.

The subject was in this unsatisfactory state, the situation becoming more and more acute, when Secretary Root took up the negotiation, which finally resulted in the special agreement of January 27, 1909, by which the questions in controversy are to be decided by a tribunal of five arbitrators selected from the panel of The Hague Permanent Court, one arbitrator being from each of the disputant countries, and three from foreign states.

The settlement of this controversy, which has so long vexed the statesmen of the United States and Great Britain, will be a matter for congratulation to both countries, as it will determine definitely and for all time their respective rights in the coast fisheries of the North Atlantic. The negotiation of the treaty of April 4, 1908 and the special agreement of last January adds another triumph to the list which bears witness to the successful diplomacy which has characterized the secretaryship of the Honorable Elihu Root.

THE INSTITUTE OF INTERNATIONAL LAW

The editors beg to call attention to the statement in the last issue, page 188, regarding the newly elected associate members of the Institute of International Law. In place of Professor Triepel of Tübingen should be the name of Christian Meurer, professor of public law at the University of Würzburg, whose authoritative work on the First Hague Conference appeared in two volumes in 1907. The official report of the meeting, which has just been received, also announces that M. Léon Bourgeois, the prominent first member of the French delegation at the Second Hague Conference, was elected to honorary membership during the same session of the Institute.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser*, Great Britain: Treaty Series.

November, 1908.

16 BELGIUM—NICARAGUA. Ratifications exchanged at Guatemala of convention relative to exchange of parcels post signed at Managua, January 17, 1908. *Ga. oficial*, January 19, 1909.

26 BRAZIL. Decree No. 2004 regulating the naturalization of aliens. Art. 1. The presentation of documents signed by diplomatic or consular agents required by Article 3 of the Decree No. 1805 of the 12th December 1907, Article 4, single paragraph No. 5, and Article 5, section 3, of the decree No. 2948 May 14, 1908 (text, *B. A. R.*, August, 1908), shall be dispensed with for purposes of naturalization. *Cd.* 4465. On expulsion of foreigners from Brazil see this *J.*, vol. I, documents, p. 410; *J. du dr. int. privé*, 34:1217, 1166.

30 ARGENTINE REPUBLIC—CHILE. Ratifications exchanged at Buenos Aires of convention signed at Buenos Aires, September 7, 1904. Free customs entry of works of art for the annual exhibitions of the Santiago and Buenos Aires salons of fine arts, and similar conditions of admission thereto. *B. oficial*, Buenos Aires, December 24, 1908.

December, 1908.

1 ARGENTINE REPUBLIC—PANAMA. Direct money order exchange organized on basis of Rome arrangement. *L'Union postale,* 33:176.

1 ARGENTINE REPUBLIC—PARAGUAY. Live stock convention takes effect. Signed at Buenos Aires May 30, 1908. *B. oficial* (Buenos Aires), December 1.

1 GREAT BRITAIN—NETHERLANDS. Agreement signed at The Hague respecting the exchange of insured letters and boxes. *Treaty ser.,* 1908, No. 37. In modification of the stipulations of articles 4 and 5 of the agreement signed at Rome, May 26, 1906, the sea rate applicable to the transmission between Queensborough and Flushing of insured boxes exchanged between the Netherlands and the countries to which the Netherlands serve as an intermediary on the one part, and Great Britain and the countries to which Great Britain serves as intermediary on the other part, is fixed at 25 centimes for each article. No insurance fee is collected for the transmission of insured letters and boxes between Queensborough and Flushing. *Staatsb.,* 1909, No. 18.

1 SWEDEN. Adhesion to international convention signed at Berne, October 14, 1890 (*State Papers,* 82:771, 796; *N. R. G.,* 2:19: 289), takes effect. Freight transportation by rail. *B. usuel,* November 1; *Monit.,* December 1. *See November 2, 1907 and September 22, 1908.*

3 CHINA. Decree referring to decree of August 27, 1908, respecting a constitution, and expressing intention to carry it out. *North China Herald,* December 5; *The situation in China, id.,* 89:629. *See August 27, 1908.*

4 INTERNATIONAL NAVAL CONFERENCE assembled at London. Object: — To assure success of the prize court convention signed at The Hague October, 1907. *Times,* December 4, 5.

5 ARGENTINE REPUBLIC—BRAZIL. Ratifications exchanged at Buenos Aires of treaty of general arbitration signed at Rio de Janeiro September 5, 1905. *B. oficial,* December 24, 1908.

5 GERMANY. Proclamation of accession of German protectorates to the international radiotelegraphic convention signed at Berlin November 3, 1906. *Reichs-G.,* 1908, No. 59; *The politics of radiotelegraphy, Edinburgh R.,* 207:465; *R. di dr. int.,* 1:562; *Documents de la conférence radiotélégraphique internationale de*

December, 1908.

Berlin, 1906, Departement des postes, Berlin, 1906; ***Zuculin: I cavi sottomarini e il telegrafo senza fil nel diritto di guerra,*** Rome, 1907; *Lorentz: Les cables sous-marins et la télégraphie sans fil dans les rapports internationaux,* Nancy, 1906; ***Report from the select committee on radiotelegraphic convention with the proceedings of the committee,*** Sessional paper 246, London, 1907; *Arch. dipl.* 104:3; *La nouvelle R.,* 3:307. *See November 3, 1906, November 8, 1907, and July 1, 1908.*

5 PERU—UNITED STATES. Treaty of arbitration signed at Washington. Ratification advised by the Senate, December 10. Ratified by the President March 1, 1909.

6 COLOMBIA—FRANCE. Treaty of general arbitration signed at Bogota.

7 GREAT BRITAIN—JAPAN. Money order convention signed at Tokyo; signed at London November 4, 1908. Takes effect January 1, 1909.

7 NICARAGUA—UNITED STATES. Naturalization convention signed at Managua. Ratification advised by Senate January 21, 1909; ratified by the President March 1, 1909.

7 PERMAMENT COMMISSION OF THE INTERNATIONAL SUGAR CONVENTION met at Brussels. *Times,* December 8.

10 BRAZIL—UNITED STATES. Ratification advised by Senate to naturalization convention signed at Rio de Janeiro April 27, 1908. Ratified by the President December 26, 1908.

10 NOBEL PEACE PRIZE awarded by Norwegian Storthing to K. P. Arnoldson, founder of the Swedish Peace Society, and Frederik Bajer, of Denmark. *Times,* December 11; this *J.,* 3:179.

11 INDIA. Indian criminal law amendment act passed by Governor General's Legislative Council. Acts of the Legislative Council become law at once but are subject to disallowance by the Crown on the advice of the Secretary of State. *Cd.,* 3912, 4426.

12 COLOMBIA—JAPAN. Promulgation in Japan of treaty of amity commerce and navigation signed at Washington May 25, 1908. Ratified by Colombia August 18, 1908. *B. del. min. de rel. ext.,* 2:20, 5.

12 NETHERLANDS—VENEZUELA. The Dutch warship Gelderland captured Venezuelan coast-guard ship Alix near Puerto Cabello and towed her to Willemstad. *See September 3 and December 31,*

December, 1908.

1908. Reprisals. See letter of *J. Westlake, Times,* December 24, 1908, on the need of making the doctrine of reprisals precise.

13 MONTENEGRO. Decree that from December 14 goods imported from countries with which Montenegro has no commercial treaty shall be taxed at the maximum tariff. *Times,* December 14.

15 NETHERLANDS—SWEDEN. Ratifications exchanged at The Hague of treaty signed at Stockholm February 26, 1908. Dutch law approving, December 7, 1908; proclamation, January 19, 1909. *Staatsb.,* 1908, No. 372; *id.* 1909, No. 13. To regulate salvage of shipwrecked vessels. The necessary measures are to be taken by the consular officers of the country to which the vessel belongs.

Art. 2. The High Contracting Parties engage to submit to the Permanent Court of Arbitration at The Hague the differences which may arise between them on the subject of the application or the interpretation of the present Convention, and which cannot be settled through the diplomatic channel.

In each particular case the respective Governments shall sign a special compromis, determining precisely the question at issue, the extent of the powers of the arbiter or of the arbitral court, the mode of designation thereof, the language which the arbiter or the arbitral tribunal shall use and those which may be used before it, the amount that each of the High Contracting Parties shall advance for expenses, as well as the rules to be observed as to the formalities and adjournments.

16 HOLY SEE—SPAIN. Exchange of notes at Madrid, in reference to Article 2 of the protocol signed July 12, 1904, and ratified July 13, 1908. Personnel of the mixed commission. *Ga. de Madrid,* December 25.

16 NETHERLANDS—PORTUGAL. Netherlands proclamation of treaty signed at The Hague October 1, 1904, fixing boundary of their possession in Timor, an island of the Malay archipelago. Netherlands law approving, December 30, 1905; exchange of ratifications at The Hague October 29, 1908. *Staatsb.,* 1905, No. 382; *id.* 1908, No. 414. The new boundary is based upon the report of the mixed commission instituted in virtue of Article II of the convention signed at Lisbon June 10, 1893. *State Papers,* 85: 394; *N. R. G.,* 2:22:463. Timor was divided between Portugal and Netherlands by treaty signed at Lisbon April 20, 1859. *Lagemans,* 5:66; *Nova collecção de tratados....* Lisboa, 1890, 1:225; *State Papers,* 50:116.

December, 1908.

Article 13. The High Contracting Parties reciprocally concede, in case of partial or total cession of their territory or their sovereign rights in the Archipelago of Timor and Solor, the right of preference on like or equivalent terms to those that may have been offered. Article 14. All questions or all differences respecting the interpretation or execution of the present Convention, if they cannot be resolved amicably, shall be submitted to the Permanent Court of Arbitration conformably to the dispositions provided in Chapter II of the international convention of July 29, 1899, for pacific settlement of international disputes.

The above-quoted article 13 is a restatement of the declaration signed at Lisbon July 1, 1893 (*State Papers,* 85:396), made an integral part of the treaty of June 10, 1893, "to insure the result of their common action which tends especially to encourage the commerce and industries of their nationals by guaranties of security and stability."

17 FRANCE. Law approving convention signed at Berne September 26, 1906, to prohibit the manufacture, importation and sale of matches which contain white phosphorus. *J. O.,* December 19. *Mahaim: La conférence de Berne concernant la protection ouvrière, R. économique int.,* 2:551; *Arch. dipl.,* 104:17; *R. di dr. int.,* 1:564; *La justice int.,* 2:146; *Actes de la conférence diplomatique pour la protection ouvrière reunie à Berne du 17 au 26 septembre, 1906.* Berne, 1906; *Conférence international pour la protection ouvrière à Berne (du 8 au 17, mai, 1905),* n. p., n. d.; *Compte rendu de la quatrième assemblée générale du comité de l'association international pour la protection legal des travailleurs tenue à Genève les 26, 27, 28 et 29 septembre, 1906,* Paris, 1907. *See December 21, 1908.*

17 HAITI. Legislature elected Antoine Simon president for term ending May 15, 1915. A revolution was inaugurated at Cayes November 19, before which Nord Alexis fled, embarking on a French warship. *Annuaire de législation haitienne (Mathon), ... 1908,* Port-au-Prince, 1909; *R. dipl.,* January 17; *The problem of Haiti, Times,* December 14.

17 TURKEY. Opening of parliament. *The Turkish parliament, Spectator,* December 19; *Fortnightly R.,* 85:165. *See July 24, 1908.* Additional references: *The new era in Turkey, Edinburgh R.,* 208:487; for origin and nature of Young Turk agitation, see *Ali Haydar Midhat Bey: The life of Midhat Pasha,*

December, 1908.

London, 1903; *Hoskins: The new Turkish parliament, Independent,* October 29; *Vambéry: Europe and the Turkish constitution, Nineteenth Century,* 64:724; *Lloyd: Some aspects of the reform movement in Turkey, National R.,* 52:412; *Gottheil: The young Turks and the old Turkey, Forum,* 40:522; *Buxton: The young Turks, Nineteenth century,* 65:16; *Ben Kendim: The opening of the Turkish parliament, Spectator,* January 2; *Racowski: Turquie constitutionnelle, Les documents du progrès,* 2:830.

19 HONDURAS—GUATEMALA, SALVADOR. Judgment of the Central American court of justice. *Mém. dipl.,* January 31. Judgment for defendants, *B. del min. de rel. ext.* (San Salvador); *Sentencia en el juicio promovido por la república de Honduras contra las repúblicas de El Salvador y Guatemala, 1908,* San Jose; *Memoria del min. de rel. ext.,* Tegucigalpa, 1909. This court was established in virtue of the treaty signed at Washington December 20, 1907, by Hondorus, Guatemala, Salvador, Nicaragua and Costa Rica. The decision appears *supra,* p. 434.

21 NETHERLANDS—PORTUGAL. Netherlands royal decree of proclamation of general arbitration treaty signed at The Hague October 1, 1904. *Staatsb.,* 1908, No. 420. *See October 29, 1908.*

20 ITALY. Law giving effect to convention signed at Berne September 19, 1906, additional to the convention of October 14, 1890, respecting railway freight transportation. *Ga. ufficiale,* December 30, 1908; *B. del min. aff. est.,* December. *See December 1, 1908.*

21 GREAT BRITAIN. Order in council, under authority of International Copyright Acts 1844 to 1866, extending to Liberia, as from October 16, 1908, the orders in council of November 28, 1887, and March 7, 1898. *London Ga.,* December 22. *See October 16, 1908.*

21 SALVADOR—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 6, 1909; ratified by the President March 1, 1909.

21 GREAT BRITAIN. White phosphorus matches prohibition Act. On September 26, 1906, at the Berne International Conference on Labor Regulation, a convention was signed by Germany, Denmark, France, Italy, Luxemburg, Netherlands, and Switzerland, agreeing to prohibit in their respective countries the manufacture, importation, and sale of matches which contain white phosphorus. For reasons explained in *Cd.,* 3271, Great Britain was not at that time able to agree to this prohibition.

December, 1908.

21 VENEZUELA. Decree opening Zulia river to commerce with Colombia. *B. A. R.*, March.

22 MEXICO. Immigration law takes effect. *Diario oficial*, December 22.

23 ARGENTINE REPUBLIC—UNITED STATES. Treaty of general arbitration signed at Washington. Ratification advised by the Senate January 6, 1909; ratified by the President March 1, 1909.

24 FRANCE—ITALY. Exchange of notes at Paris renewing arbitration treaty signed at Paris December 25, 1903. *J. O.*, December 31; *State Papers*, 96:620; *Trattati e convenzioni fra il regno d'Italia* ....17:283; *N. R. G.*, 2:31:610.

24 CUBA. José Miguel Gomez elected president by the electoral college.

25 FIRST PAN-AMERICAN SCIENTIFIC CONGRESS at Santiago. A Latin-American congress was held in 1898 at Buenos Aires, the second at Montevideo 1901, the third at Rio de Janeiro in 1905. *Times*, January 4; *American Political Science R.*, 2:441; adjourned January 5, 1908. Next congress at Washington October 12, 1911. *Reinsch: The first Pan-American Scientific Congress, Independent*, 66:370.

26 UNITED STATES—URUGUAY. Naturalization convention ratified by President of the United States; ratification advised by the Senate December 10, 1908. Signed at Montevideo August 10, 1908.

30 AUSTRIA-HUNGARY—SERVIA. Notes exchanged at Belgrade prolonging for three months the modus vivendi under which the terms of the treaty signed at Vienna March 14, 1908, are enforced pending its ratification by the Austrian and Hungarian parliaments. *Times*, December 30. *See September 1, 1908.*

30 AUSTRIA—GERMANY. Ratifications exchanged at Berlin of agreement signed at Berlin November 17, 1908. *Reichs-G.*, 1908, No. 62. Industrial property.

30 GERMANY—HUNGARY. Ratifications exchanged at Berlin of agreement signed at Berlin November 17, 1908. *Reichs-G.*, 1908, No. 62. Industrial property.

31 VENEZUELA. Decree revoking decrees of April 28 and May 14, 1908, respecting transshipment at Carúpano and Cristobal Colón for eastern Venezuelan ports and at Puerto Cabello for western. *Ga. oficial*, December 31. *See September 3, 1908.*

January, 1909.

1 BELGIUM AND FRANCE—GREAT BRITAIN. Special arrangement for exchange of boxes with declared value inaugurated. This service is on the whole executed on the conditions of the international arrangement signed at Rome. *L'union postale*, 34:32.

1 AUSTRIA AND HUNGARY. Adhesions take effect to (1) international convention signed at Paris, March 20, 1883; (2) arrangement signed at Madrid April 14, 1891; (3) protocol signed at Madrid April 15, 1891; (4) additional act signed at Brussels modifying Paris convention December 14, 1900, (5) additional act signed at Brussels December 14, 1900, modifying Madrid arrangement. The notice of adhesion was given to the Swiss Federal Council November 30, 1898, and stated that the notice of adhesion of these two countries applied *ipso jure* to Bosnia and Herzegovina. Each of the two countries is put in the first class as to contribution to the expenses of the Bureau. Industrial property. *Recueil des traités....en matière de propriété industrielle*, Berne, 1904.

1 GERMANY. Accession takes effect for protectorates to international convention signed at Berne September 9, 1886. Protection of literary and artistic property. *Reichs-G.*, 1908, No. 56; *Dr. d'auteur*, 21:157. Applies also to the act additional to that convention and to the interpretative declaration signed at Paris May 4, 1896. *J. O.*, December 18; *Treaty ser.*, 1908, No. 36. A declaration in this sense was made by the German delegation at the third sitting on November 13, 1908, of the Berlin conference for revision of the International Union Convention. The German legation at Berne notified Switzerland November 23. The treaty between France and Germany signed at Paris April 8, 1907, being, by virtue of its Article II, supplementary to the Berne convention, the accession of the French and German colonies and possessions thereto is comprehended in this accession. *J. O.*, January 10, 1909; *Dr. d'auteur*, 22:18; *Reichs-G.*, 1908, No. 57.

1 ITALY—SERVIA. Collection order service inaugurated on the basis of a special arrangement. *L'Union postal*, 34:16. A similar service was inaugurated this date between Germany and Surinam.

1 FIRST INTERNATIONAL CENTRAL AMERICAN CONFERENCE opened at Tegucigalpa. Conferences are to be held annually in January for consideration of fiscal questions and such other matters as the participating governments may see fit to submit. *B. A. R.*, February; *B. del min. de rel. ext.* (San Salvador), 1:22.

January, 1909.

4 GREAT BRITAIN—ITALY. Exchange of notes at London renewing for a further period of five years the arbitration agreement signed at Rome February 1, 1904. *Treaty ser.*, 1904, No. 3; *id.*, 1909, No. 2.

5 MOROCCO. Note of the powers signatory to the Act of Algeciras handed to Morocco at Tangier, recognizing Mulai Hafid as legitimate sultan. *Mém. dipl.*, January 10. *See September 22, 1908, and January 9, 1909.* *Q. dipl.*, 27:118.

6 FRANCE—UNITED STATES. Extradition treaty signed at Paris.

6 KONGO. Belgian decree in pursuance of the protocol signed at Brussels July 22, 1908, by Germany, Kongo, Spain, France, Great Britain and Portugal.

Art. 1. The importation of all kinds of firearms, ammunition, and gunpowder destined for natives, as well as the sale and delivery of all kinds of firearms, ammunition, and gunpowder to natives, are prohibited in that portion of the Belgian Congo's territories defined in Article 2 hereof.

This prohibition shall not, however, apply to firearms, ammunition, and gunpowder of which the Governor-General may, in entirely exceptional cases, deem it expedient to allow delivery to trustworthy natives, nor to firearms, ammunition, and gunpowder imported in transit and destined for regions outside the said territories.

In force for four years from February 15, 1909. *B. int. des douanes*, No. 3; *Monit.*, January 17, 1909.

7 HAITI—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.

7 BOLIVIA—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.

7 ECUADOR—UNITED STATES. Arbitration treaty signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.

9 MOROCCO. Response of Mulai Hafid to the note delivered him by the dean of the diplomatic corps at Tangier announcing to him that the powers had recognized him as Sultan. Text, *Mém. dipl.*, January 31.

9 COLOMBIA—UNITED STATES. Treaty signed at Washington. Panama Canal. Ratification advised by the Senate February 24, 1908. *Times*, January 11.

January, 1909.

9 PANAMA—UNITED STATES. Treaty signed at Washington. Panama canal. Approved by Senate February 24, 1908. *Times,* January 11.

9 COLOMBIA—PANAMA. Treaty signed at Washington adjusting pecuniary and other relations.

9 UNITED STATES—URUGUAY. Arbitration convention signed at Washington. Ratification advised by the Senate January 13, 1909; ratified by the President March 1, 1909.

11 GREAT BRITAIN—UNITED STATES. Treaty signed at Washington providing for the settlement of international differences between the United States and Canada. *Times,* January 28.

11 GREAT BRITAIN—SPAIN. Exchange of notes at London renewing for a further period of five years the arbitration agreement signed at London February 27, 1904. *Treaty ser.,* 1904, No. 4; *id.,* 1909, No. 3.

12 CHINA—JAPAN. Exchange of notes at Peking ratifying telegraphic convention signed October 12 and the supplementary agreement signed November 7. *Times,* January 13.

13 COSTA RICA—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 20, 1909; ratified by the President March 1, 1909.

13 CHILE—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 20, 1909; ratified by the President March 1, 1909.

15 HONDURAS—UNITED STATES. Extradition convention signed at Washington. Ratification advised by the Senate January 20, 1909; ratified by the President March 1, 1909.

15 AUSTRIA-HUNGARY—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 20, 1909; ratified by the President March 1, 1909.

16 FRANCE—SPAIN. Ratifications exchanged at Paris of the second protocol signed at Paris April 15, 1908, additional to the convention signed August 18, 1904. Railway communication across the eastern Pyrenees. *J. O.,* January 27, 1909; *Ga. de Madrid,* February 9. French law promulgating January 25, 1909. The first additional convention was signed at Paris March 8, 1905.

18 CHINA. Imperial decree. Institution of local governments prior to creation of constitution. *North China Herald,* January 28.

January, 1909.

22 ITALY—UNITED STATES. Ratifications exchanged at Washington of arbitration convention, signed at Washington March 28, 1908; ratification advised by the Senate April 2, 1908; ratified by the President June 19, 1908; ratified by Italy June 19, 1908; proclaimed January 25, 1909. *U. S. Treaty ser.*, No. 516. Term five years.

23 BRAZIL—UNITED STATES. Arbitration convention signed at Washington. Ratification advised by the Senate January 27, 1909; ratified by the President March 1, 1909.

24 CANADA—FRANCE. Convention signed at Paris supplementary to commercial convention signed at Paris September 19, 1907. *Times*, January 26. Sets up a special tariff on imports of cattle from Canada.

25 GERMANY—VENEZUELA. Treaty of friendship commerce and navigation signed at Caracas. Most favored nation clause covering persons, property and trade. *R. dipl.*, February 7.

27 GREAT BRITAIN—UNITED STATES. Special agreement signed at Washington for submission to the Permanent Court of Arbitration at The Hague of questions relating to fisheries on the North Atlantic Coast. Concluded under Article II of the general treaty of arbitration signed April 4, 1908. Ratification advised by the Senate February 18, 1909.

28 CUBA. Inauguration of President Gomez. *Nation*, February 4; *R. dipl.*, December 6, 1908; *B. A. R.*, February; *B. oficial de la secretaria de estado*, January.

30 ABYSSINIA—FRANCE. French law approving treaty signed at Adis-Ababa January 10, 1908. *J. O.*, January 31, 1909.

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES [1]

Austria, Parcel post convention between the postal administrations of the United States and. 1908. 12 p. *Dept. of state.*

China, Arbitration convention between the United States and, signed at Washington, October 8, 1908. 3 p. *Dept. of state.* (Confidential S. ex. doc. A.)

Chronological history of the Department of State, Estimate of appropriation for purchase of manuscript of a [by John H. Haswell]. December 12, 1908. 12 p. *Dept. of state.* (H. doc. 1181.)

Diplomatic service. Estimates. December 14, 1908. 14 p. *Dept. of state.* (H. doc. 1193.)

Hague international congress, Estimate of appropriation for participation in the. December 18, 1908. 2 p. *Dept. of state.* (H. doc. 1243.)

International arbitration, List of references on. 1908. 151 p. *Library of Congress.* Paper, 20c.

International institute of agriculture, Convention between the United States and other powers for the creation of an, signed at Rome, June 7, 1905, proclaimed January 29, 1908. 10 p. *Dept. of state.*

International telegraphic union, Report of the American delegates to the tenth conference of the. [Lisbon, May, 1908.] 8 p. *Dept. of state.* (H. doc. 1205.)

International waterways commission, 4th progress report, December 1, 1908, being the reports of the Secretary of State and the Secretary of War. 18 p. Paper, 5c.

Message to Congress at the beginning of the 2d session of the 60th Congress. 1908. 1, 44, 3 p., illus. *President.* Paper, 15c.

Naturalization convention between the United States and Brazil, signed at Rio de Janeiro, April 27, 1908. 3 p. *Dept. of state.* (Confidential S. ex. doc. C.)

Naturalization convention between the United States and Honduras,

[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

signed at Tegucigalpa, June 23, 1908. 3 p. *Dept. of state.* (Confidential S. ex. doc. D.)

Naturalization convention between the United States and Uruguay, signed at Montevideo, August 10, 1908. 3 p *Dept. of state.* (Confidential S. ex. doc. E.)

Naturalization, Treaty between the United States and Portugal concerning, signed at Washington, May 7, 1908, proclaimed December 14, 1908. 5 p. *Dept. of state.*

Panama, Correspondence between the United States and Colombia growing out of the secession of. December 8, 1908. 28 p. *Dept. of state.* (S. doc. 542.) Paper, 5c.

Peace palace at The Hague, Report concerning the contribution toward the adornment of the. December 15, 1908. *Dept. of state.* (H. doc. 1214.)

Peru, Arbitration convention between the United States and, signed at Washington, December 5, 1908. 3 p. *Dept. of state.* (Confidential S. ex. doc. B.)

Pharmacopœial formulas for potent drugs, Agreement between the United States and other powers respecting unification of. Signed at Brussels, November 29, 1906. 14 p. *Dept. of state.*

Porto Rico, Report of Robert Bacon and Frank McIntyre relative to the mission to, to adjust questions pending between the insular government and the Roman Catholic Church. December 14, 1908. 10 p. *Dept. of state.* (H. doc. 1204.) Paper, 5c.

Portugal, Convention between the United States and, concerning extradition, and exchange of notes concerning the death penalty, signed at Washington, May 7, 1908, proclaimed December 14, 1908. 14 p. *Dept. of state.*

Portugal, Convention between the United States and, arbitration, signed at Washington, April 6, 1908, proclaimed December 14, 1908. 5 p. *Dept. of state.*

GREAT BRITAIN [2]

Asiatics in the Transvaal, Further correspondence relating to legislation affecting. February–October, 1908. *Colonial office.* (cd. 4327.) 6d.

[2] Official publications of Great Britain, India, and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, Eng.

Belgium, Agreement between the United Kingdom and, concerning the exchange of insured letters and boxes. Signed at Brussels, July 28, 1908. *Foreign office.* (cd. 4249.) ½d.

Bulgaria, Accessions of British colonies, etc., to the treaty of friendship, commerce and navigation between the United Kingdom and, signed at Sofia, December 9, 1905. *Foreign office.* (cd. 3782.) ½d.

Bulgaria, Procès-verbal between the United Kingdom and, respecting customs duties supplementary to the commercial convention of December 9, 1905. Signed at Sofia, November 13, 1908. *Foreign office.* (cd. 4398.) ½d.

Congo state, Further correspondence respecting the taxation of natives, and other questions, in the. *Foreign office.* (cd. 4396.) 1d.

Ethiopia, Agreement between the United Kingdom and, relative to the frontiers between British East Africa, Uganda and Ethiopia. Signed at Adis Ababa, December 6, 1907. Map. *Foreign office.* (cd. 4318.) 1s. ½d.

France, Convention between the United Kingdom and, respecting the exchange of post office money orders between France and the Transvaal. Signed at London, January 25, 1908. *Foreign office.* (cd. 4427.) ½d.

France, Exchange of notes between the United Kingdom and renewing for a further period of five years the arbitration agreement signed at London, October 14, 1903. October 14, 1908. *Foreign office.* (cd. 4434.) ½d.

Importation of fire-arms, ammunition, etc., within a certain zone in Western Equatorial Africa, Protocol between the United Kingdom, the Independent State of the Congo, France, Germany, Portugal and Spain, prohibiting the. Signed at Brussels, July 22, 1908. *Foreign office.* (cd. 4320.) ½d.

Liberia, Accession of, to the International copyright convention of September 9, 1886, and the additional act and declaration of May 4, 1896. October 16, 1908. *Foreign office.* (cd. 4321.) ½d.

Liberia, Agreement between the United Kingdom and, modifying the treaty of commerce of November 21, 1848. Signed at Monrovia, July 23, 1908. *Foreign office.* (cd. 4317.) ½d.

Manuscripts of J. B. Fortescue, Esq., preserved at Dropmore, Report on the. Vol. 6. 1908. *Hist. MSS. Commission.* (cd. 3670.) 2s. 5d.

Naturalization of aliens in Brazil, Translation of decrees regulating the. *Foreign office.* (cd. 4397.) 1d.

Opium question in China, Despatch from H. M. Minister in China,

forwarding a general report respecting the. *Foreign office.* (cd. 4316.) 2½d.

Sleeping sickness, Agreement and protocol between the United Kingdom and Germany with regard to. Signed at London, October 27, 1908. *Foreign office.* (cd. 4319.) ½d.

Transvaal mines, Correspondence relating to a proposal to recruit labour in Madagascar for employment in the. *Colonial office.* (cd. 4357.) 1d.

White slave traffic, Accession of the United States of America to the International agreement of May 18, 1904, for the suppression of the. June 6, 1908. *Foreign office.* (cd. 4250.) ½d.

CAPE OF GOOD HOPE

Asiatic grievances, Report of the select committee on. 1908. xvi., 121, viii. p. *House of Assembly.*

CHILE

Inmigracion libre, Reglamento de. 1907. 14 p. *Ministerio de relaciones esteriores.*

Relaciones esteriores, Memoria del Ministerio de, presentada al Congreso nacional. 1903–1905. 199 p. *Departamento de relaciones esteriores.*

CUBA

Informe de la administracion provisional desde 1° de diciembre de 1907 hasta el 1° de diciembre de 1908 por Charles E. Magoon, Gobernador provisional. Habana, 1909. v., 549 p., illus.

Ley arancelaria que señala los derechos que deben percibirse en los consulados generales, consulados y viceconsulados de la republica de Cuba e intrucciones para su aplicación. 1908. 53 p. *Secretaria de estado y justicia.*

EGYPT

Turco-Egyptian boundary, A report on the delimitation of the, between the vilayet of the Hejaz and the peninsula of Sinai. June–September, 1906. By E. B. H. Wade. Cairo, 1908. 89 p., maps. *Survey dept.*

HONDURAS

Mensaje dirigido al Soberano Congreso nacional por el señor Presidente de la republica de Honduras Gral. Don Miguel R. Davila el primero de enero de 1909. 20 p.

ITALY

Emigrazione e colonie. Raccolta di rapporti dei agenti diplomatici e consolari. v. 1, Europa: pt. 1, Francia; pt. 2, Svizzera, Austria-Ungheria, Gran Bretagna, Spagna, Portogallo, Malta; pt. 3, Germania, Belgio, Olanda, Stati Scandinavi, Russia, Penisola Balcanica; v. 2, Asia, Africa, Oceania; v. 3, America: pt. 1, Brasile. *Ministero degli affari esteri.* Price per part, paper, 2 lire.

PANAMA

Relaciones exteriores, Documentos anexos á la memoria presentada por el Secretario de, á la Asamblea nacional de 1908. v. 1. 287 p. *Secretaría de relaciones exteriores.*

SALVADOR

Convencion celebrada en Washington en 20 de dicembre de 1907, sobre futuras conferencias Centroamericanas. Estudio que, por encargo del Ministerio de relaciones exteriores, ha elaborado el Dr. Santiago Ignacio Barberena, sobre el sistema monetario de la republica, en relacion con lo dispuesto en dicho convenio para ser presentado a la 1ª conferencia que se reunira en Tegucigalpa el 1° de enero proximo entrante. 1908. 17 p.

Honduras, Demanda intentada por el gobierno de, contra el gobierno de la República de el Salvador y contestación definitiva dada por éste ante la Corte de justicia centroamericana con motivo de la supnesta anyda del gobierno demandado en la revolución que estelló en Honduras durante el mes de Julio ultimo. 1908. 158 p. *Ministerio de relaciones exteriores.*

PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS.

UNITED STATES V. VAN DER MOLEN

(163 Federal Reporter, 650)

August 10, 1908

KNAPPEN, *District Judge.* Application is made on behalf of the United States, under section 15 of the immigration and naturalization act *(Act June 29, 1906, c. 3592, 34 Stat. 601 [U. S. Comp. St. Supp. 1907, p. 427])*, to cancel the certificate of citizenship issued to said respondent by the circuit court for the County of Newaygo, upon the ground that the court was without jurisdiction to admit the applicant to citizenship, from the fact that less than two years had intervened between the date of the declaration of intention and the date of the making and filing of the petition for citizenship. The declaration of intention was made March 28, 1905. The petition for citizenship was filed March 9, 1907, and thus less than two years after the making of the declaration of intention. Hearing was not had, however, until after the expiration of the two years.

The second subdivision of section 4 of the act requires that the alien "shall make and file" his petition for citizenship "not less than two years nor more than seven years after he has made such declaration of intention." It seems to have been the view of the court admitting to citizenship that the two-year limitation applied to the date of admitting to citizenship, and not to the date of making and filing application therefor. I am unable to agree with this construction. The language of the subdivision in question is express and explicit that the petition shall be made and filed not less than two years after the declaration of intention. The act proceeds throughout upon the theory that the right to citizenship must exist at the date of the filing of the petition therefor. The alien's right to citizenship is, by the express terms of the act, made to depend upon his possessing the requisite qualification at the date of the making and filing of such application. To illustrate: by a later provision of the second subdivision of section 4, there is required to be attached to the petition the affidavits of two witnesses as to the continuous residence of the applicant within the United States for at least five years, and of the state, territory, or district of at least one year, "immediately preceding the date of the filing of his petition." Upon the

hearing, the proof of residence within the United States and within the state or territory is directed, not to the date of the hearing, but to the date of the application. It must be made to appear to the satisfaction of the court that "immediately preceding the date of his application" the applicant has resided continuously within the United States for at least five years, and within the state or territory at least one year. The recital in the prescribed form of certificate of naturalization (not the order of the court) of finding of fact of the statutory period of residence "immediately preceding the date of the hearing of his petition" (as was required by the former naturalization law) was probably adopted by inadvertence.

If the two-year limitation is to be construed as applying only to the date of hearing, there is no apparent reason why the application should not be made at any time, and even within a day after the filing of the declaration of intention. A construction which would permit such result is entirely out of harmony with the spirit and express provisions of the act. For example: sections 5 and 6 require the clerk of the court to give at least ninety days' notice of the petition by public posting, showing, among other things, the date, as nearly as may be, for the final hearing of the petition, and the names of the witnesses whom the applicant expects to summon in his behalf. This notice is required to be given "immediately after filing the petition." The court is required to fix, by rule of court, stated days for hearing such petitions, and final action thereon may be had only on such stated days. Provision is also made for issuing subpœnas for the witnesses to appear upon the day set for final hearing; and by section 11 the United States is given the right to appear before the court for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter affecting the right to admission to citizenship, together with the right to call witnesses, produce evidence, and be heard in opposition to the granting of citizenship. These provisions are inconsistent with the idea that the petition could be filed nearly two years, if desired, previous to a date when hearing could possibly be permitted.

It is clear, to my mind, that the proceedings for admission to citizenship, involving, as they do, the formal filing of a petition in court, notice to and opportunity to be heard by an opposite party, and a judicial hearing, necessarily contemplate that the applicant is entitled to the decree sought at the time of application therefor. As said by Judge Dallas, *In Re Bodek, (C. C.) 63 Fed. 814* (in construing the previously existing naturalization act):

An applicant for naturalization then is a suitor, who by his petition institutes a proceeding in a court of justice for the judicial determination of an asserted right. Every such petition must, of course, allege the existence of all facts and the fulfillment of all conditions upon the existence and fulfillment of which the statutes which confer the right asserted have made it dependent.

The petition in the case under consideration showed on its face that two years had not elapsed between the declaration of intention and the making or filing of the petition.

It is true there is at first sight an apparent inconsistency between the requirement in the first subdivision of section 4, that the declaration of intention must be made "two years at least prior to his admission," and the requirement of the second subdivision, that the petition for citizenship be made and filed "not less than two years * * * after he has made such declaration of intention;" but there is no necessary inconsistency, and by the construction I have adopted effect can be given both provisions, while the construction sought by respondent would not give effect to the express provision of the second subdivision.

Is the provision in question mandatory? Section 4 declares that the alien may be admitted to citizenship in the manner provided by the act, "and not otherwise;" and section 15 makes express provision for canceling certificates of citizenship when illegally procured. The respondent does not lose his right of citizenship by making application too early, but is permitted to make new petition therefor, and without a new declaration of intention. I am constrained to hold that the explicit language of the statute, forbidding the filing of petition in less than two years after the making of declaration of intention, is mandatory. Being mandatory, the failure to comply with it is jurisdictional. It follows that the proceedings which resulted in the certificates of citizenship were without jurisdiction, and the certificates must be canceled.

An order for cancellation will accordingly be made.

YANGTSZE INSURANCE ASSOCIATION V. INDEMNITY MUTUAL MARINE ASSURANCE COMPANY

Law Reports, King's Bench Division, (1908), 1:910

Trial of action before *Bigham*, J., without a jury.

The action was on a policy of reinsurance dated December 13, 1904, and underwritten by the defendants. The terms of the policy and the facts of the case, as stated by the judge in his judgment, were as follows:

The plaintiffs underwrote a policy for £18,000 on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. The policy contained a warranty "not to carry cargo other than kerosene oil," and the insurance was to cover "the risk of capture." The policy was made in Shanghai. The plaintiffs were anxious to reinsure part of the risk, and accordingly on October 28, 1904, they telegraphed from Shanghai to their London office to "reinsure £15,000, including war risk, warranted no contraband of war." The London office succeeded in getting a slip initialled by different underwriters, including the defendant company; but as there was an uncertainty as to the meaning of the warranty "no contraband of war," which affected the question of premiums, the London office telegraphed to the Shanghai office on October 29 as follows: "S. S. *Nigretia*. — Reinsurance has been effected as required. There is some doubt as to the meaning of 'warranted no contraband of war.' It is understood that cargo oil kerosene only you guaranteeing not contraband. It is of utmost importance or otherwise thirty guineas per cent." The meaning of this telegram was that the underwriters were uncertain whether the Japanese courts might not regard kerosene as contraband, and they required the plaintiff company to guarantee that it was not contraband, intimating that in the absence of such a guarantee the premium would be thirty guineas per cent. This telegram was answered by the Shanghai office on October 31 as follows: "S. S. *Nigretia*. — Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee. Steamer clears Vladivostock. Are you satisfied?" This telegram was shown by the London office to the different underwriters, and was accepted as satisfactory. The slip, which up to this point had contained in this connection only the words "warranted no contraband," was then amended by adding to those words the further words, "On basis as per cable dated Oct. 31/04," and the signatories to the slip initialled the telegram so as to identify it. The defendant company underwrote £2,000. The premium was agreed at fifteen guineas per cent. Subsequently, namely, on December 13, 1904, the defendants issued their formal policy, on which the present action is brought. The policy, following the terms of the slip, contains the following provision: "Warranted no contraband of war on basis of cable dated 31 October 1904 copy of which attached hereto;" and pinned to

the policy is a typed copy of the telegram. The policy further provides as follows: "Being a reinsurance of the Yangtsze Insurance Association Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk."

At this time a state of war existed between Russia and Japan, and on December 19, 1904, while on the insured voyage to Vladivostock, the *Nigretia* was captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, where she was condemned by the Japanese prize court. The circumstances under which she was condemned appear from the judgment of the prize court. This judgment finds that on December 16, 1904, two Russian naval officers, who had assumed German names, were received on board the *Nigretia* at Shanghai as passengers to Vladivostock. There was no proof that the captain or owners of the vessel knew that these two persons were Russian officers; but, on the other hand, the court found that there was no proof that they were ignorant of the fact, and the court held that the ship "must be confiscated as the vessel was actually engaged in transporting contraband persons." The plaintiffs paid or compounded on the original policy as for a total loss, and then brought this action on the reinsurance policy to be indemnified by the defendants.

BIGHAM, *J.* This is an action brought on a policy of marine insurance effected by the plaintiffs with the defendants, which contained a warranty "no contraband of war." The only question to be determined is whether the defendants have proved a breach of the warranty so as to relieve them from liability.

[The learned judge then stated the facts as above set out, and proceeded as follows:]

The defendants say they are not liable, because there has been a breach of warranty "no contraband of war on basis of cable dated 31 October, 1904;" and the question resolves itself into this: Are contraband persons contraband of war within the meaning of the warranty? I am of opinion that they are not. "Contraband of war" is an expression which in ordinary language is used to describe certain classes of material, and does not cover human beings. Many text-writers on international law have no doubt used the expression "contraband persons," but I think I am right in saying that such words are not to be found in any English case, and certainly not in such connection as to show that they describe a class of contraband of war. The most recent text-writers treat persons as outside any accepted definition of contraband. The transport of

"contraband persons" may no doubt in some cases involve the same consequences to the ship as the carriage of contraband, but so may other acts on the part of the ship, as, for instance, transmitting information to the enemy. It would in my opinion be wrong to say that, because the same results may follow in the one case as in the other, therefore the two cases are identical and may be covered by one definition. The Japanese court carefully avoided describing these officers as contraband of war, and used the somewhat novel, but for their purpose sufficient, expression "contraband persons." The view which I take of this matter is well expressed in the fifth edition of the late Mr. Hall's Treatise on International Law at p. 673, where he says:

> With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is however more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connexion with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. * * * When * * * a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him.

A little further on, at p. 682, when examining the terms of the despatches which passed between Great Britain and the United States of America in connection with the *Trent* case, Mr. Hall points out that, whereas Admiralty Courts have power to try claims to contraband goods, they have no power to try claims concerning contraband persons; and he adds:

> To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them.

I agree that my interpretation makes it difficult to say to what the warranty would apply, having regard to the fact that the policy already contained a warranty that the cargo should consist of kerosene only; but this difficulty ought not, in my opinion, to induce me to depart from what I am satisfied is the plain meaning of the words, and the sense in which they are always understood among underwriters and merchants.

Judgment for the plaintiffs.

EX PARTE FUDERA

(162 Federal Reporter, 591)

June 24, 1908

WARD, *Circuit Judge*. This is a petition of Vincenzo Fudera, in the custody of the United States marshal for the Southern District of New York, under the application of the Italian Ambassador for the extradition of one Girolamo Asaro on the charge of murder, to be discharged under a writ of habeas corpus. The papers sent forward by the Italian government show that on October 4, 1896, Giuseppe Costa of Castellammare del Golfo was murdered. July 12, 1898, a warrant of arrest was issued in Italy for the apprehension of Girolamo Asaro, "charged with participating in intentional premeditated homicide in that with the intent of killing and with premeditation he, together with others, directed one Bucellato Martino, since dead, to murderously shoot on the night of October 4, 1896, in Bada street (territory of Castellammare), one Giuseppe Costa, thereby killing him instantly." December 3, 1898, Girolamo Asaro was convicted in his absence in contumaciam of having contributed to the murder of Costa by directing one Buccellato Martino to commit the unlawful act, and sentenced to life imprisonment.

Article 1 of the extradition treaty of 1868 between the United States and the Kingdom of Italy *(Act March 23, 1868, 15 Stat. 629)* provides that each party shall deliver up to the other

> Persons who, having been convicted of or charged with the crimes specified in the following article [of which murder is one] committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other, provided that this shall be done only upon such evidence of criminality as according to the laws of the place, where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.

One who has been convicted in contumaciam in foreign countries is to be regarded not as convicted of, but only charged with, the offense. *Moore on Extradition, art. 102.*

The petitioner contends that no evidence has been offered, as required by the treaty, which would justify a magistrate of this country in committing Girolamo Asaro for trial if the crime had been committed here. The only testimony on the subject is that of a policeman and of certain Royal Carbineers as to the result of investigations carried on by them in respect to the murder of Costa, expressed in the following language:

> We have found that the fugitive, Asaro Girolamo of Mariano, 38 years old, Buccellate Martino of Civanni, 20 years old, and the landowner, Ingaglia Stefano of Giuseppe, 26 years old, all of Castellammare, met a few days before committing the crime, in the store of Ingaglia, which is situated on Busuri street, and then and there decided to rid themselves of Costa Giuseppe, as they considered him friendly to the police force, members of which often met at his house near the mill in Baria street. They drew lots, and it fell to Buccellato Martino to put the decision into effect.

This is the sole evidence of Asaro's connection with the murder committed by Bucellato Martino, and it is pure hearsay, upon which he could not have been committed for trial in this country if the murder had been committed here.

Without considering any other question raised, I think the petitioner is entitled, according to the express provision of the treaty, to be discharged; but to give an opportunity to the demanding government to appeal from this decision, if it be so disposed, an order may be entered providing that he be enlarged upon recognizance with surety for appearance to answer the judgment of the appellate court, provided an appeal be taken within ten days from the entry of the order.

UNITED STATES V. FOO DUCK

(163 Federal Reporter, 440)

July 11, 1908

HUNT, *District Judge*. Appeal from an order of deportation made by the United States Commissioner at Missoula, Mont.

The facts, as agreed upon by the United States attorney and counsel representing the defendant, a Chinaman, are substantially as follows: The father of the defendant is a Chinaman, a merchant, in Missoula, Mont., and has been engaged in the mercantile business in that city for over fifteen years. The defendant is now over twenty-three years old. He arrived in the United States in May, 1901, when he was over sixteen years old. He has a certificate issued under the treaty between the United States and China, and in apparent conformity with section 6 of the act of Congress approved July 5, 1884 *(23 Stat. 116, c. 220* [*U. S. Comp. St. 1901, p. 1307*]). In this certificate he gave his former and present occupation as student. After the defendant arrived in Missoula, he worked as a cook and waiter at different times for several years. Part of the time he was helping the matron at the University of Montana, which is situated in Missoula, and while in this position, with the aid of the matron, he studied the English language, and learned to speak and read and write the same. He speaks English quite well, wears short hair, dresses as an American, and has evidently studied considerably.

As no question of fraud is in the case, the point for decision is this: where a minor comes to the United States from China for the purpose of joining his father, who is a merchant lawfully domiciled in the United States, and thereafter, during his minority, such minor labors and studies in the United States, is he entitled to remain in the United States after attaining his majority, or is he liable to deportation? In my opinion such a person is lawfully entitled to remain within the United States. The boy, while a minor, acquired a right of domicile by virtue of his father having such a right: that is, the father's domicile being in this country, as the parent, he had a right to have his minor child enter. *Ex parte Fong Yim, (D. C.) 134 Fed. 938.* This right was independent of any provision for certificate or compliance with other provisions of the law. *U. S. v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544.* The minor really had no occupation when he entered; hence was not within the purview of section 6, relating to those who

must obtain certificates. The reasoning which led to the construction of the statute whereby it was decided that the wife of one who is himself entitled to enter may enter without any certificate is applicable also to the case of a minor child of one so entitled to enter. Both are natural and lawful dependents upon the one who may lawfully have established his domicile in the United States. As the Supreme Court has said:

> In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and, whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate.

U. S. v. Chin Sing, (D. C.) 153 Fed. 590, is remarkably like the case of this appellant. There the defendant entered the United States in 1898, when he was fourteen or fifteen years old, and joined his father, and worked as a helper in his father's store. Upon proceedings had under deportation statutes, Judge Wolverton held that the son had a right to enter without first procuring the certificate, as required by section 6 of the exclusion act, and that having come to the country while a minor, and being the son of a resident Chinese merchant, the defendant was lawfully entitled to remain in the United States. The decision of Judge Wolverton was rendered April 8, 1907, thus showing that the minor, who was fourteen or fifteen years old when he entered the United States in 1898, was twenty-three or twenty-four years of age when the court decided that he was lawfully entitled to remain.

The court, however, is asked whether the case before it is not to be distinguished because of the fact that the appellant worked as a laborer from and after the time he attained his majority. The answer is that: having rightfully entered this country as a minor, and not with intent to become a laborer, he has not forfeited a right to remain by working as a laborer since he was twenty-one. In other words, his coming having been rightful, the fact that, when emancipated, he followed the pursuit of a class of persons who are not entitled to enter, did not operate to deprive him of the right to remain. It is the coming of Chinese laborers into our country that the act is aimed against, and not the expulsion of persons who are here, not having come as laborers, but as children, and

who, perchance, have become laborers in America after they have attained legal age.

My judgment is that the defendant has shown a lawful right to be in the United States, and to remain here, without regard to the certificate held by him.

He will be discharged.

IN RE BUNTARO KUMAGAI

(163 Federal Reporter, 922)

September 3, 1908

HANFORD, *District Judge.* This applicant for naturalization is an educated Japanese gentleman, and, in support of his petition to be admitted to citizenship, he presents a certificate showing that at the expiration of a term for which he enlisted as a soldier in the regular army of the United States he was honorably discharged. There appears to be no objection to his admission to citizenship on personal grounds, and the court has given no consideration to any questions which might be raised of a formal character; the intention of the court being to rest its decision denying the application on the single ground that Congress has not extended to Japanese people not born within the United States the privilege of becoming adopted citizens of this country.

It is the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what persons shall enjoy the rights and privileges of citizenship, and our Constitution declares that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

That is a broad provision, and comprises children of all aliens subject to the jurisdiction of our government without distinction as to race or color; the only exceptions being children of alien parents not subject to the jurisdiction of the United States. *United States v. Wong Kim Ark, 169 U. S. 665, 18 Sup. Ct. 456, 42 L. Ed. 890.* By our Constitution the power to provide for the naturalization of aliens is vested in Congress, the courts have no power to admit aliens to citizenship, otherwise than in accordance with the laws which Congress has enacted, and

aliens can not demand admission to citizenship as a right. They can only claim the privilege of becoming adopted citizens under the provision of laws enacted by Congress. The general policy of our government in regard to the naturalization of aliens has been to limit the privilege of naturalization to white people, the only distinct departure from this general policy being soon after the close of the Civil War, when, in view of the peculiar situation of inhabitants of this country of African descent, the laws were amended so as to permit the naturalization of Africans and aliens of African descent. In the year 1862 *(Act July 17, 1862, c. 200, sec. 21, 12 Stat. 597)* a law was enacted in recognition of services of aliens who enlisted in the military service of this country, authorizing naturalization of aliens who should be honorably discharged from military service and that law became incorporated in title 30 of the Revised Statutes of the United States as section 2166 *(U. S. Comp. St. 1901, p. 1331)*. As originally enacted by Congress, section 2169 merely extended the privilege of naturalization to Africans and aliens of African descent, but by the act of 1875, to correct errors and supply omissions in the Revised Statutes, that section was amended to read as follows:

> The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.[1]

As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and, being the latest expression of the will of Congress on the subject, it is controlling, and limits the privilege of naturalization to white persons and those of African nativity or descent. The use of the words "white persons" clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country. *In re Ah Yup, Fed. Cas. No. 104; In re Saito, (C. C.) 62 Fed. 126; In re Yamishita, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860.*

As this applicant is of a different race, the court is constrained to deny his application on the ground that the laws enacted by Congress do not extend to the people of his race the privilege of becoming naturalized citizens of this country.

[1] Act Feb. 18, 1875, c. 80, 18 Stat. 318 (U. S. Comp. St. 1901, p. 1333).

FULCO V. SCHUYLKILL STONE CO.

(163 Federal Reporter 124)

July 30, 1908

ARCHBALD, *District Judge.* The plaintiffs are citizens and residents of Italy and the subjects of its King, and bring suit for damages for the death of their son, who was killed, as they allege, by the negligence of the defendant company by whom he was employed. The accident by which he lost his life occurred in Pennsylvania, and suit is brought on the statutes of that state, giving a right of action to the parents of the deceased in such cases. *Act April 15, 1851, sec. 19 (P. L. 674); Act April 26, 1855, sec. 1 (P. L. 309).* It is contended by the defendants that the plaintiffs, being nonresident aliens, have no right to sue, and it is upon this that the demurrer proceeds. It was decided by the Supreme Court of Pennsylvania, in *Deni v. Pennsylvania Railroad, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676,* and again in *Maiorano v. Baltimore and Ohio R. R., 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778,* that nonresident aliens are not entitled to the benefit of this legislation, not being within its purview, and have no standing in consequence to maintain an action founded upon it. The same construction is put upon similar statutes in other jurisdictions. *Brannigan v. Union Gold Mining Co., (C. C.) 93 Fed. Rep. 164; McMillan v. Spider Lake Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947; Roberts v. Great Northern Railway, (C. C.) 161 Fed. 239; Adams v. British Steamship Co., 2 Q. B. (1898) 430.* Although the weight of the authority is the other way. *Davidsson v. Hill, 2 K. B. (1901) 606; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; Alfson v. Bush, 182 N. Y. 396, 75 N. E. 230, 108 Am. St. Rep. 815; Kelleyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; Romano v. Capitol State Brick Co., 125 Iowa, 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323; Railroad v. Naylor, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701; Renlund v. Commodore Mining Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; Vetaloro v. Perkins, (C. C.) 101 Fed. 393; Hirschkovitz v. Pennsylvania Railroad, (C. C.) 138 Fed. 439; Baltimore and Ohio R. R. v. Baldwin, 144 Fed. 53, 75 C. C. A. 211.* But the construction put upon the Pennsylvania statutes, by the courts of that state, is binding here, without regard to how the law may be elsewhere *(Zeiger v. Pennsylvania Railroad,* [*C. C.*] *151 Fed. 348; Id.* [*C. C. A.*] *158 Fed.*

809), unless, of course, it is found to be in contravention of the federal law.

It is contended as to this that the plaintiffs are protected by the existing treaty between the United States and Italy of February 26, 1871 *(17 Stat. 845)*, which provides:

> ARTICLE 3. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.
>
> ARTICLE 23. The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials.

There was no reference to this treaty in the *Deni* or the *Zeiger* Case; although there was in the *Maiorano*, where it was decided to have no effect; the court holding that, while the treaty may in terms include the entire citizenship of Italy, it obviously is available only to those who either with respect to their persons or property, are within the jurisdiction of the United States. This is a federal question, and the decision of the state court is not controlling; but upon an independent consideration of it, the same conclusion is to be reached.

The rights guaranteed to the citizens of Italy by the one article (3) are constant protection and security for their persons and property, as to which they are to enjoy the same rights and privileges as are or shall be guaranteed to natives. The other article (23) merely preserves the right to resort to the courts to maintain and defend their rights, without other conditions or restrictions than are imposed on natives. But in so guaranteeing protection and security to the persons and property of citizens of Italy, it is manifest that this can only refer to the persons and property of such citizens when within the states and territories of this country. There certainly is no intended guaranty of their persons elsewhere, and neither is there of their property. What property or right of property, then, under the laws of Pennsylvania, do the plaintiffs show which is not accorded them? Certainly they had none in the person or the earnings of their son, for whose death they sue; it not being alleged that he was a minor — if that makes any difference — but merely that

he contributed to their support. The continued expectation of this, no doubt, may measure the loss sustained by the parents by the death of a child, but in no sense is it property, *North Penn Railroad v. Robinson, 44 Pa. 175,* to the contrary, notwithstanding. *Moe v. Smiley, 125 Pa. 136, 141, 17 Atl. 228, 3 L. R. A. 341.* Nor, apart from the statute, did the defendant company owe the plaintiffs any duty to see that their son had a reasonably safe place to work in, the lack of which is the negligence charged, however much they may have owed it to the son himself; this action not being for the enforcement of any obligation to the party killed, which has been transmitted to his parents, through him, but for a distinct cause of their own, if they have any. The whole contention then is brought down to this: that, a right of action being given by the laws of Pennsylvania to its own citizens, under similar circumstances citizens of Italy are entitled to the same, regardless of anything else, because the treaty guarantees the same rights and privileges, as to their persons and property, as are enjoyed by natives. The treaty, in other words, is invoked to raise, or force a right, where none exists without it; but that is not the way it reads. A right existing, it provides that it shall be respected in the same manner and to the same extent in the case of a native of Italy as of a native of this country. It by no means undertakes to put them both in all respects and under all conditions, on an absolute par, to which the doctrine contended for necessarily leads. The state of Pennsylvania, had it so chosen, was at perfect liberty to provide in so many words, in favor of its own citizens only, that in case of death by negligence a right of action should accrue to certain specified relatives, declining to extend it to residents of other countries; but, by the construction put upon the statute by the Supreme Court of the state, that in effect is just what has been done, it being the same as though this proviso was written into it, which the treaty cannot be made to override. It was for the state, in other words, to give or to withhold the right, as well as to define the extent of it and the parties who were to be benefited, and, having withheld it in such a case as we have here, that is the end of the matter.

There are authorities, no doubt, which hold otherwise as to the effect of such a treaty (*Railroad v. Naylor, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. [N. S.] 473, 112 Am. St. Rep. 701; Bahuaud v. Bize [C. C.] 105 Fed. 485;* and possibly *New Orleans v. Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329*). But not, as it seems to me, with reason.

Judgment is therefore directed to be entered on the demurrer in favor of the defendants, with costs.

DECISIONS CONCERNING EXPULSION OF FOREIGNERS FROM BRAZIL [1]

Résumé

Le droit d'expulser un étranger est un attribut essentiel de la souveraineté, un droit préexistant à l'admission de l'étranger sur le sol de la nation et dont l'exercice est une condition toujours présumée de cette admission; l'article 72 de la constitution du Brésil assurant à l'étranger, durant sa résidence, au Brésil les mêmes garanties qu'au national n'a pas pour effet d'empêcher la nation d'expulser celui qui trouble l'ordre et la tranquillité publics.

L'expulsion n'a pas le caractère d'une peine proprement dite; elle est une mesure de police administrative rentrant, comme telle, dans les attributions du pouvoir exécutif. Et lorsqu'il a été fait régulièrement notification à l'étranger d'une décision du ministre de la Justice " lui prescrivant de quitter le territoire national, parce que son séjour dans la capitale compromet la tranquillité publique," un tel ordre d'expulsion est suffisamment motivé aux termes des articles 1 et 8 de la loi du 7 janv. 1907,[2] et, par suite, doit recevoir son exécution.

Mais le tribunal suprême fédéral et les tribunaux fédéraux de section n'en demeurent pas moins compétents pour connaître des demandes d'*habeas corpus* formées contre les ordonnances d'expulsion.

Le pouvoir judiciaire peut donc ordonner l'*habeas corpus* quand l'ordre d'expulsion n'a pas été régulièrement notifié et suffisamment motivé ou quand l'étranger ne se trouve pas dans les conditions voulues par la loi du 7 janv. 1907 — si, par exemple, il habite au Brésil depuis plus de deux ans.

Décision du tribunal suprême fédéral, le 30 janvier, 1907

Le citoyen français, Albert Benamow a demandé une ordonnance d'*habeas corpus*. Il a exposé et fait valoir qu' il avait été arrêté par ordre du ministre de la Justice pour être expulsé du territoire, aux termes de l'article 1 de la loi nº. 1641 du 7 janv. 1907; que la Constitution garantit aux étrangers résidant dans le pays, comme droits inviolables, la liberté et la sécurité individuelles, de sorte que les étrangers ne peuvent être expulsés du territoire de la République; qu'il résidait dans la capitale depuis de longues années; que l'expulsion est une véritable peine, échappant par suite à la compétence du pouvoir exécutif; qu'il n'avait pas été donné au plaignant notification officielle de son expulsion, notification nécessaire pour l'exercice du recours prévu par l'article 89 de cette loi; que pour les raisons ci-dessus la contrainte qu'il avait subie

[1] Quoted from reports by P. Sumien, P. Goulé and Al. Martin, printed in *Revue de droit international privé et de droit pénal international*, 1908, Nos. 4–5, p. 821.

The notes comparing French and Brazilian law are also from that *Revue*.

[2] See Supplement, *1*:410.

dans sa liberté était illégale; — Cons. qu'il appartient au Tribunal suprême de rendre l'ordonnance d'*habeas corpus*, quand la contrainte procède de l'autorité dont les actes sont soumis à sa juridiction (L. n. 221 de 1894, art. 23). — Cons. que dans ces conditions rentrent les ministres d'État, qui, pour les crimes de droit commun et entraînant leur responsabilité, sont poursuivis et jugés exclusivement par ce Tribunal; — Cons. que le droit d'expulser un étranger est un attribut essentiel de la souveraineté, un droit préexistant à l'admission de l'étranger sur le sol de la nation et dont l'exercice est une condition toujours présumée de cette admission; qu'il suffit seulement qu'il n'ait pas été dans les intentions du législateur de la Constitution d'interdire l'usage de ce droit aux pouvoirs souverains de la nation; — Cons. que la Constitution en assurant à l'étranger résidant dans le pays l'inviolabilité de la liberté et de la sécurité individuelles, a voulu seulement déclarer que l'étranger *durant sa résidence au Brésil* aurait les mêmes garanties que le national, ce qui évidemment n'a pas pour effet de priver la nation du droit de l'expulser de son sein, quand il porte atteinte à l'ordre et à la tranquillité publics; — Cons. que cette interprétation n'est pas contredite par l'article 72 de la Constitution, parce que, si le gouvernment ne peut empêcher l'étranger de pénétrer sur le territoire national, tant que dure sa situation de résidant, rien n'empêche qu'il soit privé de cette situation; qu'en outre l'étranger n'a pas *droit à la résidence* dans le pays, ce droit étant réservé aux nationaux; — Cons. que les garanties définies dans l'article 72 de la Constitution ne peuvent, comme on le prétend, être entendues littéralement et en termes absolus; toutes étant plus ou moins sujettes à des restrictions, imposées par les convenances de bien général, par l'ordre public, par l'hygiène, etc.; — Cons. que la jurisprudence affirmée par ce tribunal dans de nombreux jugements admet que les garanties promises par la Constitution à l'étranger résidant au Brésil n'excluent pas le droit d'expulsion; mesure d'ordre public universellement adoptée comme un élément d'assainissement moral, de conservation et de défense (Jugements, n°. 322 du 6 juin 1892; n°. 388 du 21 juin 1893; n°. 617 du 22 sept. 1894; n°. 758 du 13 mars 1895; n°. 1106 du 3 aout 1898; n°. 979 du 11 oct. 1905) — Cons. que la loi n°. 1641 du 7 janv. 1907, réglant le droit l'expulsion et en limitant l'exercice, prohibe dans son art. 3 la déportation d'un étranger résidant sur le territoire de la République pendant deux années continues ou même pendant moins de temps, s'il est marié avec une Brésilienne ou veuf avec un fils brésilien; cons. que le plaignant ne justifie pas qu'il se trouve dans l'un des cas prévus par

cet article; — Cons. que l'expulsion d'un étranger n'a pas le caractère d'une peine proprement dite, que c'est une mesure de police administrative, rentrant virtuellement comme tell dans les attributions du pouvoir exécutif; — Cons. qu'il a été fait notification au plaignant de la décision ordonnant son expulsion, qui est déclarée: "rendue en vertu d'un ordre du ministre de la Justice du 23 janvier, lui prescrivant de quitter le territoire national, son séjour dans la capitale compromettant la tranquillité publique (art. 1 de la loi nº. 1641)," justifiant que la décision contient les motifs d'expulsion nécessaires pour l'exercice du recours administratif prévu par l'article 8 de la loi, et est valable par suite de l'avis officiel mentionné dans l'art. 3; — Cons. que, par ces motifs, le plaignant n'a pas subi de contrainte illégale dans sa liberté. — Décidons de refuser l'ordonnance demandée et condamnons le plaignant aux frais.

Décision du tribunal fédéral de deuxième instance, le 11 février 1907

Le Tribunal, Vu la demande d'*habeas corpus* présentée au nom d'Augusta Roth, autrichienne, expulsée du territoire brésilien sur l'ordre du ministre de la Justice. — Cons. que le reproche d'inconstitutionnalité soulevé contre la loi nº. 1641 du 7 janv. 1907 a contre lui la jurisprudence du Tribunal suprême affirmant, que l'expulsion des étrangers dans des circonstances déterminées n'est pas en opposition avec l'article 72 de la Constitution (décisions nºs. 322 du 6 juin 1892, 338 du 21 juin 1893, 758 du 13 mars 1895 et 116 du 3 aout 1898); * * * — Cons. que, soit que l'on admette, avex les premières de ces décisions, que l'exercice de cette faculté est indépendant de toute autorisation légale, soit que l'on admette, avec les dernières, que cette faculté est subordonnée à l'existence d'une loi qui l'autorise et la réglemente, il est manifeste que la loi du 7 janvier restreint le pouvoir arbitraire de l'autorité administrative, en prescrivant les cas dans lesquels peut avoir lieu l'expulsion, d'un étranger et les conditions auxquelles elle doit être effectuée; — Cons. que, par suite, le pouvoir exécutif est soumis dans l'exercice de cette attribution, aux limitations et règles fixées par le législateur et qu'en les enfreignant il porte atteinte aux droits qu'elles consacrent et garantissent; — Cons. qu'il appartient au pouvoir judiciaire fédéral, ayant pour organes le tribunal suprême et les tribunaux de sections (const. art. 35, décr. nº. 848, art. et 3), de protéger les droits individuels menacés ou lésés contre les violations de la Constitution ou des lois fédérales; — Cons. qu'il est indifférent que cette violation émane d'un particulier ou d'un acte de la puissance publique indifférent aussi, que cet acte s'inspire

de motifs d'ordre privé ou de raisons d'ordre politique, et qu'il suffit pour motiver l'intervention des tribunaux qu'elle soit sollicitée par la partie intéressée et que dans l'espece il soit justifié de l'atteinte à un droit individuel; — Cons. que conférer ou reconnaître au pouvoir exécutif compétence pour décider de l'opportunité ou de l'inopportunité de l'expulsion d'un étranger (comme en matière d'*extradition*) n'a pas pour effet d'écarter ou de méconnaître la compétence des tribunaux pour juger de l'illégalité de l'acte, de la procédure, de la réalité ou de la fausseté des motifs déterminants de l'expulsion; — Cons. qu'il est inadmissible (telle est du moins l'opinion des auteurs et la pratique suivie dans tous les pays) qu'une semblable mesure soit pratiquée en dehors des raisons d'ordre et de sécurité rappelées dans l'article 1er de la loi du 7 janv., et que le législateur et la Constitution aient entendu remettre cette matière à la discretion du pouvoir exécutif, en excluant toute intervention des tribunaux; qu'il est clair que le droit d'expulsion est contenu et limité dans l'autorisation donnée par cet article, auquel il n'y a pas lieu d'opposer les dispositions des articles suivants; — Cons. que l'institution d'un recours ordinaire dans l'article 8 de ladite loi, limité au cas de preuve de la fausseté des motifs de l'expulsion, n'a nullement pour effet de restreindre le recours extraordinaire de l'*habeas corpus*, que la Constitution assure aux nationaux et aux étrangers *toutes les fois* qu'ils subissent ou sont menacés de subir une contrainte par suite d'illégalité ou d'abus de pouvoir (Const., art. 72, sec. 22); — Cons. que le système contraire aboutit à cette conclusion que le pouvoir exécutif est investi du droit exorbitant d'expulser du territoire national des étrangers paisibles, des étrangers residant au Brésil depuis plus de deux ans, et même jusqu'à des nationaux, et qu'il lui suffit, pour enlever le recours de l'*habeas corpus* (seul efficace dans l'espèce) et empêcher l'intervention du pouvoir judiciaire, d'alléguer que son acte est motivé par l'article 1er; — Cons. que le haut tribunal suprême fédéral, dans sa dernière session, instruisant et jugeant un recours d'*habeas corpus* présenté par un étranger expulsé en vertue de l'article 1er, a consacré la doctrine admettant la recevabilité de ce recours;[3] — Cons. que dans l'expulsion de la demanderesse on a violé les dispositions de l'article 7, en ne lui faisant pas une notification officielle, avec les motifs déterminants de la décision, comme la loi le prescrit; — Cons. que l'avis défectueux et incomplet remis à la demanderesse déclare qu'elle *a été expulsée aux termes* de l'article 1er du décret du 7 janv. 1907, tandis que le ministère de la Justice déclare "qu'elle est

[3] V. la décision précédente, p. 496.

expulsée en vertu de l'article 2 du même décret, comme exerçant le proxénétisme;" — Cons. que cette divergence entre deux documents également officiels aggrave l'illégalité de l'acte, en constituant un obstacle empêchant la plaignante d'user du recours ordinaire de l'article 8; — Cons. en outre que la plaignante établit, par des documents produits devant le juge fédéral de 1re instance, qu'elle réside dans le pays depuis plus de deux ans et que, par suite, elle doit bénéficier de l'exception mentionnée dans l'article 3 de ladite loi; — Cons. que la mesure prise contre la plaignante est illégale, que l'acte de gouvernement soit fondé sur l'article 2 comme l'indique l'avis ministériel, ou sur l'article 1er invoqué dans la décision — que l'*habeas corpus* est, dans l'espèce, le seul remède légal — jugeons le recours recevable et faisons droit à la demande.

OBSERVATIONS. L'expulsion des étrangers est régie au Brésil par une loi récente du 7 janv. 1907, dont les deux jugements ci-dessus rapportés font application.

Le droit d'expulsion, qui appartient au ministre de la Justice, est à la fois limité et réglementé par cette loi.

Limité: Le jugement du Tribunal fédéral du 30 janv. 1907, nous indique, en effet, qu'il y a des étrangers qui ne peuvent point être expulsés; le jugement du tribunal fédéral de deuxième instance du 11 févr. 1907, nous montre que les cas d'expulsion sont nettement délimités et classés en deux catégories distinctes.

Réglementé: Des deux jugements il résulte, en effet, que la mesure d'expulsion doit être exactement motivée, et qu'elle peut être l'objet d'un recours, selon les cas, soit devant les tribunaux auxquels la loi donne mission d'examiner le bien ou mal fondé des motifs allégués, soit auprès de l'autorité qui l'a prononcée.

Il en est tout autrement en France, de par la loi du 3 déc. 1849, qui est, paraît-il, à la veille d'être profondément modifiée. C'est une raison de plus pour analyser, avec les jugements ci-dessus, la nouvelle loi brésilienne, rapportée d'ailleurs, avec les instructions ministérielles qui l'ont suivie.[1]

I

La loi du 7 janv. 1907 dispose d'abord que: "l'étranger qui, pour un motif quelconque compromet la sécurité nationale ou la tranquillité publique peut être expulsé * * * du territoire national" (art. 1er); et que "sont également des motifs suffisants d'expulsion: (1) une condamnation ou une poursuite devant les tribunaux étrangers pour crime ou délit de droit commun; (2) deux condamnations au moins devant les tribunaux brésiliens pour crimes ou délits de droit commun; (3) le vagabondage, la mendicité ou le proxénétisme dûment établis" (art. 2). Quant à l'article 3 de la loi, il édicte que "l'étranger ne peut être expulsé, s'il réside sur le territoire de la République depuis deux années continues, ou même depuis moins longtemps, s'il est marié avec une Brésilienne, ou veuf avec un enfant brésilien." C'est d'ailleurs, parce que le "plaignant," dans notre première espèce, n'a point justifié qu'il se trouvait dans un des cas

[1] V. Supplement, *1*:412.

prévus par ce dernier article, qu'il a vu l'arrêté pris à son encontre maintenu; c'est, au contraire, entre autres raisons, parce qu'elle a justifié qu'elle résidait dans le pays depuis plus de deux ans, que la requérante de la deuxième espèce a pu echapper à la mesure prise contre elle.

En France, au contraire, les motifs qui peuvent occasionner l'expulsion ne sont nullement délimités, et aucun étranger n'en est à l'abri.

L'étranger est passible d'expulsion, dès que sa présence sur notre territoire constitue un danger, et pareille mesure peut être prononcée sans que l'on ait à se préoccuper du point de savior s'il s'y trouve de passage, ou s'il y a une résidence déjà longue, s'il y est fixé à perpétuelle demeure, et même s'il est autorisé à domicile. En ce cas, cependant " la mesure cesse *de plano* de produire son effet," si l'autorisation n'a pas été révoquée par décision du Gouvernement. L'article 7 de la loi du 3 déc. 1849 porte, en effet: " Le ministre de l'Intérieur pourra, par mesure de police, enjoindre à *tout étranger*, voyageant ou résidant en France, de sortir immédiatement du territoire français et le faire conduire à la frontière. * * * Le ministre aura le même droit à l'égard de l'étranger qui aura obtenu l'autorisation d'établir son domicile en France; mais, après un délai de deux mois, la mesure cessera d'avoir effet, si l'autorisation n'a pas été revoquée. * * * "Aussi certains jurisconsultes s'élèvent-ils contre un pouvoir qu'ils trouvent démesuré, et souhaitent-ils que, tout en conservant à l'État la faculté de repousser de son territoire les étrangers dangereux ou gênants, on réglemente l'exercise de cette faculté.[5] On peut noter, d'ailleurs, que certains États, notamment la Belgique et les Pays-Bas, avant le Brésil, ont adopté en notre matière, des disposition dont la loi du 7 janv. 1907 paraît s'être inspirée. La loi belge du 12 févr. 1897 [6] porte que " l'étranger résidant qui par sa conduite compromet la tranquillité publique, ou celui qui est poursuivi ou qui a été condamné à l'étranger pour les crimes ou délits qui donnent lieu à l'extradition, peut être contraint par le Gouvernement de sortir du Royaume (art. 1er); mais aux termes de l'article 2: ne peuvent être expulsés, pourvu que la nation à laquelle ils appartiennent soit en paix avec la Belgique: (a) l'étranger autorisé à établir son domicile dans le Royaume, (b) l'étranger marié à une femme belge dont il a un ou plusieurs enfants nés en Belgique pendant sa résidence dans le pays, (c) l'étranger, marié à une femme belge résidant en Belgique depuis plus de cinq ans et continuant à y résider d'une manière permanente. * * * " D'après la loi néerlandaise également, " ne peut être expulseé l'étranger qui, établi dans le pays, a épousé une Néerlandaise et a eu plusieurs enfants nés dans le royaume." [7]

Nous n'en estimons pas moins qu'il est, d'une part, impossible, et pour le moins inutile, de vouloir de la sorte énumérer les causes d'expulsion, et, d'autre part, qu'il est dangereux d'en affranchir certaines catégories d'étrangers.

Tout d'abord, il paraît impossible de déterminer de façon précise les cas dans lesquels l'expulsion doit pouvoir être appliquée. " Elle est affaire de circonstances; il convient de laisser l'autorité compétente seule appréciatrice des

[5] V. not., Weiss, *Tr. de dr. int. pr.*, 2e éd., t. 2, p. 92.

[6] V. *Ann. de lég. étrang.*, t. 27, année 1898, p. 514.

[7] V. Jitta, ***Le dr. d'expuls. des étrang. dans la législ. des Pays-Bas*** (***J. dr. int. pr.***, 1902, p. 69).

nécessités qui peuvent la déterminer."[8] En tout cas, si l'on pense que les motifs d'expulsion peuvent être nettement déterminés, il faut bien reconnaître que ces motifs seront toujours assez nombreux pour laisser en somme au gouvernement une entière liberté de décision.[9] Déclarer, en les énumérant, que sont des motifs suffisants d'expulsion: une condamnation ou la poursuite devant des tribunaux étrangers pour crimes ou délits de droit commun deux condamnations au moins devant les tribunaux brésiliens pour pareils crimes ou délits — le vagabondage, la mendicité, et le proxénétisme; — alors qu'on a déjà décidé que l'étranger qui compromet la sécurité nationale ou la tranquilité publique peut être chassé, n'est-ce pas, en effet, autoriser l'autorité compétente à prononcer l'expulsion sur une vaste échelle, à ses risques et périls? Autant, dès lors, ne pas faire une énumération qui est un trompe-l'oeil, selon la saisissante expression de notre regretté rédacteur en chef. Le ministre de la Justice du Brésil peut, en effet, expulser ceux qui troublent la sécurité nationale ou la tranquillité publique, ceux qui ont été condamnés ou poursuivis, les vagabonds, les mendiants et les proxénètes; il n'a rien à envier à notre minister de l'Intérieur. — Remarquons, d'ailleurs, que le projet déposé le 4 mars 1882, sur le bureau de la Chambre des députés par MM. Goblet et Humbert, et, qui a précisément pour but de réglementer le droit d'expulsion, n'a tenté aucune énumération de causes légitimes.

Quant à affranchir certaines catégories d'étrangers de la mesure qui nous occupe, nous croyons qu'il y a là un danger véritable. Pourquoi, à priori, mettre à l'abri de cette mesure des individus qui, au demeurant, sont restés étrangers? Assurément, celui qui s'est marié avec une Brésilienne a fait montre de quelque attachement envers le Brésil; mais est-ce une raison pour lui donner du coup l'assurance que, quoi qu'il advienne, le Brésil ne pourra point se séparer de lui? — Pourquoi traiter, d'ailleurs, avec plus de mansuétude les veufs avec des enfants? — Est-ce que deux années de résidence continue peuvent suffire à enraciner profondément sur le sol d'un pays?

Le project de MM. Goblet et Humbert n'a affranchi aucun étranger de la menace d'expulsion; mais, il a cependant assimilé l'étranger résidant en France depuis plus de trois ans à l'étranger admis à domicile. Comme ce dernier, il pourrait être expulsé; mais pour tous deux, la mesure cesserait d'avoir effet, après un délai de deux mois, si elle n'a pas été confirmée par décision du gouvernement, après avis du Conseil d'État. — Même ainsi réduite, nous ne croyons pas que la faveur faite aux étrangers résidants doive être approuvée.[10] — Pourquoi mettre de la sorte sur le pied d'égalité l'étranger résidant et l'étranger autorisé à domicile? Dire qu'il mérite autant d'intérêt, étant donné que le plus souvent il n'a pas demandé l'admission à domicile, parce qu'il ignorait cette procédure, ou reculait devant la formalité de l'enquête administrative[11] est justifier de façon assez singulière l'intérêt que l'on réclame pour lui!

[8] V. Piédelièvre, *précis de dr. int. publ.*, t. 1, n°. 210, p. 182. *Adde*, Lainé, *De l'expulsion des étrangers appelés à devenir français par le bienfait de la loi* (*J. dr. int. pr.*, 1897, p. 710).

[9] V. en ce sens, Piédelièvre, *loc. cit.*

[10] V. cep., Weiss, *op. cit.*, t. 2, p. 93, *in fine*-94.

[11] V. not., Legrand, rapport (*J. off.*, Chambre des députés, Doc. parl., avr. 1882, p. 946).

II

Des jugements ci-dessus, il résulte, en outre, que l'arrêté prononçant l'expulsion doit contenir les motifs à raison desquels il est pris — et qu'il peut être déféré soit à l'autorité de qui il émane, soit aux tribunaux eux-mêmes. L'article 7 de la loi du 7 janv. 1907 dispose, en effet: " Le pouvoir exécutif fera notifier dans une note officielle à l'étranger qu'il décide d'expulser, les motifs de sa décision. * * *" Et, de par l'art. 8: "* * * l'étranger pourra exercer un recours devant le pouvoir même qui a ordonné son expulsion, si elle est fondée sur la disposition de l'art. 1er, ou devant le pouvoir judiciaire fédéral, s'il est procédé en vertu des dispositions de l'art. 2. Dans ce dernier cas seulement, le recours aura un effet suspensif." — En d'autres termes, de deux choses l'une: (a) l'étranger a été expulsé, à raison d'une condamnation prononcée par un tribunal étranger, ou de deux condamnations prononcées par un tribunal brésilien, ou à raison de sa qualité de vagabond ou de proxénète, il peut s'adresser directement à la justice et y établir qu'il n'a encouru aucune condamnation, qu'il n'est ni un vagabond, ni un proxénète; le tribunal est compétent pour " connaître de la réalité ou de la fausseté des motifs." Le jugement du tribunal fédéral de deuxième instance du 11 fevr. 1907 (2e espèce ci-dessus), le dit en propres termes; — (b) l'étranger a été expulsé parce qu'il compromettait la tranquillité publique, il peut recourir au ministre lui-même, et prouver qu'à aucun moment il n'a constitué un danger, qu'il n'a jamais violé la loi de l'hospitalité. Même en ce cas, d'ailleurs, — c'est ce qu'il importe de bien remarquer — l'étranger peut encore s'adresser à la justice, et obtenir une ordonnance d'*habeas corpus*. Le Tribunal fédéral puise, en effet, dans son pouvoir de juger les crimes et délits de droit commun des ministres d'État, le droit de contrôler leurs actes et de déclarer qu'ils ont exercé " une contrainte illégale sur la liberté individuelle." L'autorité judiciaire annulera alors l'ordre d'expulsion notamment, si l'individu qui en est l'objet n'est point passible d'une telle mesure, s'il est Brésilien ou domicilié au Brésil depuis deux ans, si la décision prise n'a pas été notifiée à l'intéressé avec ces motifs, enfin si l'ordre est *irrégulier:* le gouvernement, en appliquant faussement l'article 1er à un vagabond ou à un proxénète, ne saurait, en effet, lepriver du recours judiciaire institué par l'article 8. Notre deuxième espèce le dit expressément. Un jugement de 22 janv. 1907 du tribunal fédéral, aff. *De Freitas* (*J. dr. int. pr.* 1907, p. 1166) le proclame également.

Chez nous, au contraire, aucune disposition n'impose au ministre de l'Intérieur de motiver ses arrêtés; et, la loi du 3 déc. 1849 n'ouvre aux intéressés aucune voie de recours devant nos tribunaux. La jurisprudence [12] et la doctrine [13] sont

[12] V. not., Cons. d'État, 4 août 1836, *Naundorff* (S. 1836. 2. 445); 8 déc. 1853, *Dame de Solms* (S. 1854. 2. 409); 22 janv. 1867, *Radziwill* (*Rec. des arrêts du Conseil d'État*, p. 94); Cass. 3 août 1874 et 8 févr. 1876 (S. 1876. 1. 193); Paris, 29 Janv. 1876 (S. 1876. 2. 297); Trib. de la Seine, 10 août 1878 (*J. dr. int. pr.*, 1878, p. 495); Cons. d'État, 14 mars 1884, *Morphy* (S. 1886. 3. 2.); 26 déc. 1902, *Rapi* (cette *Revue*, 1905, p. 529; S. et P. 1906. 3. 96). Comp. Cons. d'État, 14 mars 1890, *Ribes* (S. et P. 1892. 3. 85), et la note sous cet arrêt.

[13] V. not., Weiss, *op. cit.*, t. 2, p. 92, note 2; Féraud-Giraud, *De la réglementation de l'expuls. des étrang.* (*J. dr. int. pr.*, 1890, p. 424); Arthur Desjardins

d'accord pour déclarer que le bien ou mal fondé de la mesure d'expulsion ne peut être débattu ou querellé devant une jurisdiction, que, seule *l'Administration est juge des motifs* qui, d'après elle, l'ont rendue nécessaire. — L'autorité judiciaire n'a compétence que pour connaître de la *légalité* de l'arrêté, c'est-à-dire, pour examiner si la mesure atteint vraiment un étranger. Si l'individu expulsé, poursuivi devant le tribunal correctionnel conformément à l'article 8 de la loi du 3 déc. 1849, pour infraction à l'arrêté, prétend qu'il est Français, le tribunal non seulement peut, mais encore doit, contrôler les dires de l'inculpé, et au cas où il les reconnaît exacts, déclarer la mesure illégalement prise.[14] Mais, en aucun cas, les motifs de l'expulsion ne sont envisagés, son mérite n'est mis en cause.

Nous comprenons que la loi brésilienne exige que les motifs soient nettement indiqués — et, nous souhaiterions même que nos arrêtés fussent moins laconiques;[15] mais il nous paraît inadmissible, d'une manière générale, que des tribunaux puissent, dans une mesure quelconque, être juges des motifs qui ont nécessité une expulsion, ces motifs se rattachant souvent à des questions qui intéressent la tranquillité et l'ordre publics, la sécurité nationale. Comment apprécieront-ils, en effet, en pleine connaissance de cause la mesure intervenue? On ne pourra pas cependant leur apporter les rapports confidentiels des préfets, "leur révéler certains périls intérieurs, peut-être même extérieurs, les faire participer à la direction politique des affairs." * * *[16] Et. puis, si l'expulsion n'est pas une peine, mais une mesure de surêté générale, de police administrative, comme le disent les jugements ci-dessus, et ainsi que chacun le pense,[17] pourquoi les tribunaux en connaîtraient-ils? Par sa nature, l'expulsion doit échapper à l'appréciation de l'autorité judiciaire. Lorsqu'une expulsion arbitraire, non fondée, intervient, ce n'est pas aux tribunaux que l'on doit s'adresser; il suffit de demander aide et protection à son consul, de provoquer l'intervention de l'envoyé diplomatique du pays auquel on appartient.[18] Il suffira à lui seul pour faire rapporter un arrêté injustement pris.

D'ailleurs les expulsion arbitraires ne sont point tant à redouter! A part

(*Ques. soc. et polit.*, p. 107); Bès de Berc, *De l'expuls. des étrang.*, p. 33, 64 et s.; Darut, *Id.*, p. 202 et s.

[14] V. en ce sens, Paris, 11 juin 1883 (S. 1883. 2. 117); Cass., 7 déc. 1883 (S. 1885. 1. 89); Paris, 6 févr. 1884 (S. 1885. 2. 215); Alger, 2 déc. 1886 (*Rev. algér.*, 1886, p. 449); Cass., 28 mai 1903 (*J. dr. int. pr.*, 1904, p. 689). *Adde*, Weiss, *op. cit.*, t. 2, p. 92, note 2; Féraud-Giraud, *loc. cit.*, p. 425; Bès de Berc, *op. cit.*, p. 66 et s.; Darut, *loc. cit.* Comp. Cons. d'État, 14 mars 1890, *Ribos*, précité, et la note sous cet arrêt.

[15] V. la formule-type de nos arrêtés dans Brayer, *Procéd. adm. des bureaux de police*, p. 325–326, et dans Darut, *op. cit.*, p. 161, note.

[16] V. Arthur Desjardins, *op. cit.*, p. 107, *in fine*–108. *Adde*, en ce sens, Bès de Berc, *op. cit.*, p. 65.

[17] V. not., Weiss, *op. cit.*, t. 2, p. 88, *in fine*, 91; Bonfils et Fauchille, *Man. de dr. int. publ.*, 5e éd., n. 1055; Lainé, *loc. cit.*; Ducrocq, *Cours de dr. adm.*, 7e éd., t. 3, n. 1134–1135; Garraud, *Tr. de dr. pén.*, 2e éd., t. 1, n. 178, p. 333; Arthur Desjardins, *loc. cit.*, p. 107; Bès de Berc, *op. cit.*, p. 64; Darut, *op. cit.*, p. 25 et s.

[18] V. en ce sens, Pradier-Fodéré (*J. dr. int. pr.*, 1878, p. 590).

quelques cas, que l'on n'oublie pas de rappeler avec une certaine complaisance,[19] où l'Administration s'est montrée d'une sévérité excessive, on ne peut lui reprocher de conduire aux frontières des étrangers pour le seul plaisir de les chasser de la France. Comme nous le disions naguère, dans cette *Revue* même, "dans la réalité des cas, les étrangers que l'on expulse l'ont presque toujours mérité par une conduite immorale, par des idées subversives, même par des délits, en un mot par le danger qui s'attache à leur présence sur notre sol." [20]

Un État, au surplus, ne peut point s'abuser du droit d'expulsion; l'abus susciterait fatalement des rancunes, appellerait des actes de rétorsion et entraînerait des difficultés internationales.[21] Puis, il faut tenir compte du contrôle que les Chambres exercent sur le Gouvernement. La Chambre des députés notamment l'exerce de façon efficace; toutes les expulsion importantes ont donné lieu devant elle à des debats passionnés dont le Gouvernement est toujours sorti triomphant. — La plupart des législations enfin, ainsi que le remarque, en le déplorant, il est vrai, M. P. Fiore,[22] ne connaissent pas de voies de recours judiciaire en matière d'expulsion.

Au résumé, la loi brésilienne du 7 janv. 1907 peut être excellente au Brésil, où l'immigration doit être favorisée; mais nous ne croyons pas qu'il soit à souhaiter que le Gouvernement français la prenne pour modèle ou même s'en inspire dans son prochain projet.

Une dernière observation. — Les deux jugements ci-dessus déclarent que la loi du 7 janv. 1907 n'est pas inconstitutionelle, et que, par suite, elle doit recevoir application. An Brésil, en effet, les tribunaux ont le droit de tenir pour non avenues les lois contraires à la Constitution. On alléguait, dans les deux espèces qui ont donné lieu à nos jugements, que la loi du 7 janv. 1907 était contraire à l'article 72 de la Constitution, d'après lequel: "Les étrangers jouissent, à titre égal des Brésiliens, de l'inviolabilité des droits de liberté, de sécurité individuelle et de propriété." A cette prétention, le tribunal suprême fédéral répond énergiquement "que les garanties définies dans l'article 72 ne peuvent être entendues littéralement et en terms absolus, toutes étant plus ou moins sujettes à des restrictions imposées par les convenances du bien général, par l'ordre public; * * * que, dés lors, les garanties promises par la Constitution à l'étranger résidant au Brésil n'excluent pas le droit d'expulsion, mesure d'ordre public universellement adoptée comme un élément d'assainissement moral, de conservation et défense." Cela était utile à souligner, en terminant, alors surtout que le tribunal fédéral avait jugé, le 22 janv. 1907, à propos de l'affaire *De Freitas*, précitée, que la loi du 7 janv. 1907 portait au moins atteinte à la Constitution, en permettant d'expulser un étranger à raison de condamnations ou de poursuites encourues dans son pays d'origine.

AL. MARTINI.

[19] V. not., R. Hubert, *Et. prat. de l'expuls. des étrang.* (*Gaz. des Trib.* du 1er oct. 1897); Darut, *op. cit.*, p. 158 et s.

[20] V. note sous diverses décisions relatives à l'expulsion des étrangers appelés à devenir français par le bienfait de la loi (*R. de dr. int. pr.*, 1908, p. 656 et s.).

[21] V. en ce sens, not., Piédelièvre, *op. cit.*, t. 1, n. 210, p. 182.

[22] V. P. Fiore, *Nouv. dr. int. publ.*, 2e éd. (trad. Antoine), t. 1, n. 699.

BOOK REVIEWS

Letters of Mrs. James G. Blaine. Edited by Harriet S. Blaine Beale. New York: Duffield & Co. 1908.

This publication will be a disappointment to the public man who examines it with a view to finding new light upon the career of one of the most conspicuous actors in the history of the American people during the last half of the nineteenth century. Mrs. Blaine was known to be in active sympathy with her distinguished husband in his political contests and services, and the natural expectation would be to find in a compilation of her letters many references to these matters. But an examination of the two volumes shows that they contain very few letters to either Mr. Blaine or to his intimate political friends, and that they are made up almost exclusively of letters from Mrs. Blaine to her children and to them when they were in their school-days.

The compilation was evidently a labor of love and filial devotion, and the object of its publication seems to have been, not as a contribution to political history, but to show Mrs. Blaine in her true character as a loving wife and mother through her family relations and her social life. For this purpose the work has been very well done, and to the letters some valuable notes of historic interest have been added by the editor for the enlightenment of the reader.

Notwithstanding the somewhat limited scope of the work, it contains a number of interesting references to political and diplomatic affairs, worthy of notice in a review for the JOURNAL. In a letter to her son Walker written in 1879, after the national presidential convention of 1876 and just before that of 1880, in both of which Mr. Blaine was a prominent candidate for the nomination, we get a glimpse of Mrs. Blaine's view of political life, when she writes: "Your father is so occupied [with the Maine election] that after he emerges from his chamber in the morning, I do not require or receive so much civility as a word from him, and sometimes I am so deeply disgusted with American politics, our whole system of popular government, with its fever, its passion, its excitement, disappointment, and bitter reaction, that any sphere, however humble, which gives a man to his family, seems to me better than the prize of high place."

But the next year, after Garfield had been elected president, she wrote to her daughter, "Oh! how good it is to win and be on the strong side." And two years later, in the midst of the ever-recurring Maine contest which robbed the family of the attentions of the head of the house, she consoles herself by saying: "After all there is something very pleasant in a Maine election to me."

During the four successive presidential campaigns, 1876, 1880, 1884, and 1888, when Mr. Blaine was a prominent figure, his aspirations for the high office must have been the topic uppermost in the family, yet in Mrs. Blaine's letters we find only occasional references to them and for the greater part of those periods few or no letters appear. Enough, however, is published to indicate the state of feeling in the home circle. On the eve of the convention of 1880 she wrote her daughter M., a schoolgirl at Farmington: "I do not know what to say about the week of the convention and coming home. * * * I am almost sure a combination will be made against your Father, and then I would rather you were in Farmington. * * * I have lately thought he would get it, but now I am very doubtful. His rivals are desperate."

Two years after the failure in the convention of 1880, in writing again to the same daughter, she reported "Ben. Harrison" as taking part in the Maine campaign, and adds he "is very likely to be the next presidential Republican nominee — did I hear you sigh?" About the same time she wrote Mr. Blaine, who was on a stumping tour in the West, that she saw he was reported as taking part in a conference at which Harrison was present: "I am sure you did not, but I venture to say *don't.* All I ask of you is to stay dumb." Although the nomination came to him in 1884, the campaign is largely passed over in silence. But three weeks after its fateful close, we have this letter to one of her daughters, giving a vivid picture of the scene as the election returns were received at the Augusta home:

"You need not feel envious of any one who was here during those trying days. It is all a horror to me. I was absolutely certain of the election, as I had a right to be from Mr. ———'s assertions. Then the fluctuations were so trying to the nerves. It is easy to bear now, but the click-click of the telegraph, the shouting through the telephone in response to its never-to-be-satisfied demand, and the unceasing murmur of men's voices, coming up through the night to my room, will never go out of my memory — while over and above all, the perspiration and chills, into which the conflicting reports constantly threw the physical

part of one, body and soul alike rebelling against the restraints of nature, made an experience not to be voluntarily recalled."

But it seems Mrs. Blaine did recall four years later one of the most untoward incidents of that disastrous campaign. On November 3, 1888, she sent from New York a letter to "Dear Jamie," the youngest son, then at school, giving a description of the grand Republican parade on the eve of the election, and referred to having witnessed a similar parade in honor of his father in 1884, which was preceded in the afternoon by the address of Dr. Burchard, whose alliteration of "rum, Romanism, and rebellion" is credited with having suddenly turned victory into defeat. Sadly she says: "It recalls that awful Saturday afternoon four years ago, but O, the difference to me!"

The presidential aspirations of Mr. Blaine, as revealed in the Letters, may be dismissed with one more extract. In 1887 Mr. Blaine and a portion of the family went to Europe on account of his health. As the time for a presidential convention again approached, his friends and adherents were anxious to know his intentions or desires respecting another nomination. Mrs. Blaine, in a letter from Florence, Italy, to her youngest daughter, the editor of these Letters, gives his decision: "Breakfast just over — 9.30 — your Father in good spirits reading over his letter of declination, which goes in a day or two to Mr. Jones, chairman of the Republican National Committee. Do not cry, it has to go, and we shall all be happier for being spared a summer of suspense with the chances of defeat in the autumn. You know what Savonarola said when he had been tortured into confession, 'A man without virtue may be a Pope, but such a work as I contemplated demanded a man of excellent virtues.' Apply this to Pater and the Presidency."

The first reference to diplomatic matters in the Letters is found in Mrs. Blaine's account given to her son Walker of the visit of the Iwakura mission from Japan in 1872. She speaks of the punctilious ceremonies arranged by the Secretary of State, Mr. Fish, of the various consultations with her of Mr. and Mrs. Fish respecting them; and the prominent part assigned her because of her position as wife of the Speaker of the House. In describing the ceremonies at the Executive Mansion, she made this generous allusion to the wife of the President: "I was quite unprepared for the womanliness, cordiality, and thoroughly unaffected kindliness of Mrs. Grant's reception of these semi-heathen. I could not have done half so well."

During the critical period of 1872, when the Geneva arbitration of the

"Alabama" claims was in danger of failure, because of the British protest against the American national and indirect claims, it appears that Mr. Blaine took a deep interest in maintaining the attitude of our government, and held a lengthy interview with Secretary Fish urging that no embarrassing concession be made to the British attitude.

The first entrance of Mr. Blaine on direct diplomatic duties was as secretary of state under President Garfield in March, 1881, and from the beginning they proved very welcome to him, as within two weeks after he entered upon this work we find Mrs. Blaine writing to her daughter in Paris, "the Secretaryship grows more and more agreeable." But it was to prove of short duration, as the bullet of Guiteau laid low his chief, and the new president desired another head to the department of state. It is apparent from the Letters that Mr. Blaine earnestly desired to remain in the office, and that the supercession was a great disappointment to the family. Only a few days before President Arthur sent the nomination of Mr. Frelinghuysen to the Senate, Mrs. Blaine wrote to her daughter: "Congress is in session, so we are daily expecting your Father's head to roll into the basket. I cannot but feel a little blue, though the person chiefly interested was never gayer or in better health."

Although his incumbency of the department only covered nine months, it marked a period of great activity. Among other measures, he issued his circular dispatch to the American ministers in Europe, informing the Great Powers of the purpose of the United States to make the Isthmian Canal an American enterprise; he assumed the position that the Clayton-Bulwer treaty was obsolete and no longer binding on us; he dispatched his commission of plenipotentiaries to South America to mediate in the war between Chili and Peru; and he took steps to call a conference of the American States. With the coming of a new secretary most of those measures were halted or reversed, but Mr. Blaine lived to see some of them realized in later years.

No part of Mr. Blaine's political career is more fully elucidated in the Letters than this period. Immediately after the change in the department it was given out that the change was necessitated by his interference with the war in South America, and Mrs. Blaine wrote to her daughter: "Do not feel uneasy about anything you may hear politically. The Chili and Peru business need not give you the slightest concern. It is a decided policy instead of drifting, as cowardly Americans desire to do. Your Father has asserted the rights of his country as was his bounden

duty." Two weeks later she writes to the same daughter (then in Paris) as follows: "Your Father's policy, which is decidedly American, you will see much criticised, and you must remember that this is greatly to his credit. A policy which European countries would applaud, could not be very American."

A little later when the Chili-Peru correspondence had been made public, she wrote again: "I hasten to say, let not your heart be troubled, neither let it be afraid. Only on the publication of those state papers yesterday morning did your Father know that his instructions had been altered and revoked. * * * Your Pater has decided on the patient dignity of perfect silence. But he says he never wrote papers of which a man or his children ought to be more proud, and there is not a single word in them he would have changed. * * * Undoubtedly the State Department intended the life of your Father. They revoked his instructions, though they were Arthur's as well; they kept back his papers, they sent to Congress garbled dispatches of Trescott's, they permitted private letters of Christiancy to be sent to Congress. * * * Your Father will be vindicated in every particular. His policy is a patriotic one, and the people are so going to recognize it. Not a selfish thought in it, but it is in all its ramifications American." And some weeks later she adds: "Serene in the consciousness of a policy or policies which looked out for the interests of America, and which time is as sure to justify as it is to come, he may well wait undisturbed, while Mr. Frelinghuysen accounts to his master, the people, for his truckling subserviency."

Whatever may be the judgment of history on these policies of Mr. Blaine, there is no question that his enforced retirement from public life at that time was in two respects a great gain to his country and of lasting benefit to his fame. It enabled him to devote undivided attention to the preparation of his oration on the death of Garfield, delivered at the request of Congress in the Hall of the House of Representatives, which will take a high rank among the classic eulogies of great men. This was followed by his "Twenty Years of Congress," written during the two years after his retirement from the department.

In the same month of his retirement Mrs. Blaine wrote to her daughter M.: "School is out, but the boy is not at play. On the contrary, his leisure is as oppressive to him as Rollo's on his holiday, and were it not for the Garfield eulogy, which makes a goal for his reveries, I should think him a little blue." We have a delicate revelation of Mr. Blaine's tenderness of heart which could only be made in the familiarity of this

family correspondence. Mrs. Blaine, in giving her daughter an account of the preparation of the eulogy, writes that she sits by the hour quietly in the room while he works, for he enforces silence, and she says: "For the second time this morning, I see him taking from the drawer a fresh pocket handkerchief, with which he vainly tries to hide his tears, and this time, wholly overcome, he has beaten a retreat to the blue room."

The ordinary hero-worshipper who fancies that his ideal hero, endowed with great genius, is able to dash off an oration without premeditation, may learn a lesson from these Letters. Although Mr. Blaine was one of the most versatile of the public men of his time, very ready of speech, and an orator of eminence, we get an insight into the manner of occupation of the two months' undivided time he gave to the Garfield Eulogy, in Mrs. Blaine's account to her daughter: "No better proof of the imminence of the 27th [the date fixed for its delivery] could be given, than the immense pile of books, while waiting transportation to the State Library. In fact your Father is at this moment, for the eleventh time, going over the manuscript, smoothing out all inequalities of language, for he persisted in the first place in writing in the most careless manner, insisting always, when I remonstrated on the awful after labor that he way laying up for himself — 'Let me get down the ideas, and the language will come of itself." But, alas, he often finds it frozen truth, only to be warmed into motion by infinite nursing and pains."

We find that two years after he left the department of state he was still engaged upon his Twenty Years of Congress, but his work does not appear to have attracted so much the attention and interest of the family. Of this Mrs. Blaine says: "Your Father is writing a book, his Twenty Years in Congress. It will not probably be interesting to you, and to me, but think of the many, many, who will want to read and to own it."

This literary work was doubtless interesting and afforded a temporary outlet to his restless energy, but it did not satisfy the ambition which impelled him to other occupation. Writing six months after his retirement, Mrs. Blaine says: "You must not imagine he suffers from one regret for public life, quite the contrary, you could not at present drive him back. The love will revive, I doubt not, but now he is bound to try other paths." The other path which first opened was the presidential campaign and defeat of 1884, but from the time he held the seat at the head of the Garfield cabinet, he specially longed to return to the management of diplomatic affairs. In the same month in which he was forced

to give up that post Mrs. Blaine wrote her daughter: "I have had a long talk with him, finding him very cheery. * * * He says there is only one position he craves in the future, the Presidency may go, but he would like to carry out his views of statecraft in 1885 as Secretary of State." Two years later she writes again: "The one thing he perhaps does desire is to be once more Secretary of State." And other expressions of a similar character appear in the correspondence.

The opportunity so much desired came when President-elect Harrison invited him to become secretary of state. The confidence which Mrs. Blaine reposed in her children is shown in her letter to "Dear Jamie," then a schoolboy, imparting the confidential communication of Mr. Harrison, "in his own handwriting, full of cordial words and good understanding," and she adds, "no doubt your Father will accept this trust, and gladly." Two days after he entered on the duties of the department she wrote: "It is all delightful, delightful to see your Father occupied with urgent business worthy of his high powers." And to Mr. Manly on the same day: "Mr. Blaine enjoys his occupation thoroughly. I have not seen him look so well, so gay, for a long, long while."

It is charming to note the high estimate of his intellectual ability which prevailed in Mr. Blaine's family and the freedom with which it is mentioned in the Letters. In writing to her daughter M. of the Clayton-Bulwer treaty discussion which followed his departure from the department, she exclaims at the end, "I would give more for what lies within the frosty paw of my John Anderson than all the brains of all the others." And again: "All the diplomats evidently regard the late Secretary of State as the one formidable American." Just as he was about to reenter the cabinet of President Harrison, she writes: "I thrill when I think of the part which your Father may play in the future of this country."

Notwithstanding the high hopes with which the family hailed Mr. Blaine's return to the management of diplomatic affairs, these expectations were only to be realized in part. The first dark cloud appearing above the horizon is indicated by Mrs. Blaine, ten days after official duties had been resumed, when she writes to the editor of the work under review, then at the Farmington school, giving an account of the presentation of the diplomatic corps to the President: "It is all interesting, though Harrison is of such a nature that you do not feel at liberty to enjoy yourself. For instance, he objected to Jacky [Walker B.] as First Assistant Secretary of State. Your Father did not care to make a fight

about it, so he quietly put him in as law-adviser. * * * All propositions are rejected. It is a most uncomfortable twist in the make-up of a man."

The other trouble which obstructed the unalloyed enjoyment and success of the head of the Department, is indicated in Mrs. Blaine's letter written within two months after taking the post. "Congratulate me and the principal sufferer, that the embargo of the lumbago is removed and that your Father is actually out again."

It is known that gradually the relations between the Executive Mansion and the residence of the premier of the cabinet became quite strained; and that attacks of severe illness often incapacitated him from the discharge of his duties. But here, so far as revealed in this work, the curtain drops upon the political life of the great Secretary.

JOHN W. FOSTER.

Halleck's International Law. Fourth edition, thoroughly revised and in many parts rewritten by Sir G. Sherston Baker, Bart., assisted by Maurice N. Drucquer. 2 vols. London: Kegan Paul, Trench, Trübner and Co. 1908.

General Halleck's original work was especially valued because of its fullness of treatment of the laws of war and of the experience of the author in that direction. For thirty years Sir Sherston Baker has borne the relation of an editor to this work, correcting what was in his judgment obsolete or mistaken, at first by notes, but in the later editions by changes of text. As to the character of these changes the curiosity of the reader is somewhat aroused by the unusual tone of the preface. Writing of the Conventions framed by the Second Hague Conference he says:

> Whether all or any of these conventions will ever be accepted by any powers, even by an inferior power, remains to be seen. The Second Conference met with great pomp and circumstance, but has achieved nothing. * * * No general or admiral worth the name would pause in difficult strategy, or at the moment of victory, because some effeminate article of the Second Hague Convention or other grandmotherly conference, forbade him to do so and so.

And the author felicitates himself that his work is "not one of theory but eminently one of practice" and used by all British ships of war.

Let us see. Of the fifteen conventions of this "grandmotherly" Second Hague Conference, the delegates of Great Britain signed (with reservation in five cases) all but one. Many of these have entered the rules of war. They are as binding upon their signatories as any other international

agreement. The breach of them means bad faith; it may mean also damages. Yet our author assures us that his dictum of the existing law drawn from precedent, is what a British officer will follow, rather than an international agreement. He is one of that class, now happily growing small, which would make a hide-bound non-progressive science of the law of nations, failing to see that it grows and is actually in process of piecemeal codification, by the best means possible — treaty stipulation.

It is the new matter in this fourth edition, not General Halleck's work, but Sir Sherston's work, which is under review. Halleck's first chapter is a brief history of International Law by periods. To this the present edition has added an eleventh section, from the Civil War of 1861 to the present time, noting the principal events, the important questions and the names of writers on the law of nations. As illustrative of the author's sense of proportion, no mention is here made of Morocco and the Algeciras conference, the Congo question since 1888, the Second Hague Conference, amongst important questions, while there is included, "The decision of the Queens Bench Division in the 'Mignonette' case in 1884, that the old law of the sea permitting cannibalism in extremest necessity is wrong," a judgment which Sir Sherston takes pains to combat.

The American publicists who have caught his eye in this period are D. D. Field, R. H. Dana, President W. A. P. Martin, Wharton, Cushman Davis and Hannis Taylor. Of J. B. Moore, Professor Wilson, Professor Snow, J. B. Scott, Professor Hershey and others he says nothing; nor of any Japanese writers though Takahashi has written in English and Ariga in French. Kleen is not given from Scandinavia, but Aubert, Goos and Olincrona. W. E. Hall is not mentioned amongst English publicists, yet his authority is second to that of no other writer in English.

Five-sixths of volume one relate to international law in time of peace. There are a hundred pages more than in the first edition, yet it is hard to see that the additions and changes have been of uniform value or the old text as "thoroughly revised" as the title asserts under date of 1908. Here are a few of the errors or omissions noted:

I: p. 151. A commodore "who is the highest officer in the United States navy."

I: p. 176. Our fishery treaty of 1818 with Great Britain is not stated to be perpetual in terms, which was its unusual and distinctive feature.

I: p. 177. The Fur Seal Arbitration is referred to, but the decision of the court as to jurisdiction over seals at sea, and as to property right in seals at sea, the point at issue, is not given. One is left in the dark as to the result of the arbitration.

I: p. 190. Amongst the rivers whose navigation has been made free, the Congo

is not mentioned. The Italian theory that allegiance is the best test of civil status, which has been widely followed, is not alluded to.

I: p. 195. Reference is made to the alliance between the South African Republics and the Orange Free State which anticipated the Boer war, although the former "was said by Great Britain to be a semi-sovereign state under British suzerainty." In point of fact the treaty veto power upon which the claim to suzerainty was founded, expressly excluded these two states from its operation.

I: p. 177. The decision in the 'headland' question, which declared the big bays like Fundy to be a part of the high seas (Mr. Bates, referee in the case of the *Washington*) does not appear in the discussion of this subject.

I: p. 501. The Dogger Bank inquiry is stated to have been made by "this permanent court at The Hague," which is manifestly an error, having been made by a specially constituted committee of admirals.

Certain features of the old edition are retained, *e. g.*, the very full statement as to naval salutes and etiquette, and the valuable description of consular courts in the east and of the mixed courts in Egypt. On the other hand a convenient list of treaties for the abolition of the slave trade which was in the first edition, is now omitted. The marginal topic notes on each page are a good addition. There is an immense mass of references to authors, but they are mostly antiquated. Thus Hall is cited only once in volume I and not at all in volume II.

In his treatment of the relations of states in time of war, the editor is even more disappointing. Our war with Spain, England's war with the Boers, Japan's war with Russia, particularly, furnished many *causes célèbres* which have since been the subject of plentiful discussion and of international legislation. The references to these in the new edition are few and brief and perfunctory. Moreover it is a serious reproach to a work dated 1908, that it incorporates none of the rules of war agreed to at The Hague in 1907 and early in 1908. Surely they were worth waiting for, had that been necessary. The printing of the text of the convention respecting the laws and usages of war on land at the end of a chapter (but none of the other conventions relating to war) does not relieve the editor of this reproach. Even the 1899 Hague Conventions are largely disregarded. In speaking of them (II:18) he writes:

> How far the spirit of these conventions will be maintained in time of war is very uncertain. * * * The ferocity of war in actual practice will not suffer itself to be tied by hard and fast rules. We fear that these conventions are more likely to be honoured in the breach than in the observance.

The experience of the Russo-Japanese war, if the editor had cared to study it might have reassured him. To assume without proof, that a

treaty is going to be violated and therefore to think ill of its provisions, is hardly a scientific spirit. This neglect of something which for some unexplained reason is distasteful leads to errors in treatment of important subjects which are vital. Thus (I: p. 160) the restriction of the legalized *levée en masse* to non occupied territory, is not mentioned. The abuse of floating mines in the *Gulf of Pe chi li* is properly characterized (I: p. 620) but the convention of 1907 to regulate the practice is not noticed.

The Hague, 1899, prohibition of the use of an enemy's uniform is not noted. The editor seems (II: p. 82) to have an entire misconception of the 1899 Hague rule as to bombardment which prohibited it in *un*defended places only. This discussion of privateering stops with our Civil War. The discussion of contraband (II: p. 264) *ancipitis usus* leaves out the *Knight Commander* case, although that is referred to, later (p. 310) with the mistaken assertion that Russia paid damages for its sinking. The treatment of the doctrine of continuous voyages (II:339) is inadequate with a bare reference to the Boer War cases and no reference to its approval by the Institute. One of the noteworthy changes in the text (I:630) is dictated by the desire to cast discredit upon the execution of Major André. A lengthy note (II: p. 18) gives the correspondence between von Moltke and Bluntschli as to the rules of the Oxford (1880) Manual, in order to illustrate the military attitude. This is interesting but appears to confuse the provisions of a treaty with a code drawn up by a mere committee of a learned society. Does the editor mean to imply that a German general would violate the 1899 convention in case of war!

It would be easy to multiply instances of inadequate treatment, of national prejudice, of personal bias. The truth is that the promise of the title page is not fulfilled. The " thorough revision " is illusory.

THEODORE S. WOOLSEY.

Die staatsbürgerliche Sonderstellung des deutschen Militärstandes. By Erich Schwenger. J. C. B. Mohr: Tübingen. 1907. pp. viii, 129.

The author makes the assertion that his monograph is the first to deal, in systematic fashion, with the particular rights and obligations involved in the German military status. To accomplish this purpose, he has minutely digested about twenty imperial statutes bearing in any manner upon the subject and has arranged their contents, with his own commentary, under the proper headings.

The introduction seeks to define the class-term " military persons " within the meaning of the statutes and shows that the term embraces

those in the naval service as well as in the army. Nor is the status limited to those in active service but embraces also retired officers under pension (p. 12).

Throughout the German Empire, military persons occupy a peculiar position both in respect of political as well as civil rights. As to the former, the book shows the extent to which the German state has gone in protecting itself against military domination. The intention of the statutes appears to be the complete disenfranchisement of all persons belonging to the active service. This refers, however, only to the "active electoral right" of voting at political elections and not to the "passive electoral right" or representing the people in the legislatures of the states, or of the Empire. It is interesting to note, however, that since the formation of the German state, Count Moltke has been the only active military person to serve as representative of the people in the Reichstag (p. 22).

A large portion of the book is devoted to a consideration of the peculiarities of the military status in respect of private right. Under this head, the deviations from the normal status appear to be more numerous and extensive in the German Empire than in most modern states.

An imperial statute enacts a restriction upon the capacity to marry in that the consent of the division commander is essential. This is additional to requisites which the particular state demands in the case of military persons (p. 35). An inhibition which differs in legal character from the foregoing is that which prevents military persons of the active service from engaging in any business or trade without the consent of their superior officers. This does not effect a limitation of capacity, as the sanction of the law rests on penalty alone (p. 38).

An interesting section is devoted to special rules applicable to the execution of soldiers' wills, from which it appears that the German law of recent time has repealed the old exception of the Roman law sustaining verbal testaments "*in procinctu*" except when reduced to writing in the presence of superior military officers and read over to the testator (p. 47).

The special position occupied by military persons in respect of punishment for crime tends to exempt them from the jurisdiction of the ordinary civil tribunals. The author defines the jurisdiction of the various courts martial provided by the statutes and outlines in brief their organization and procedure (p. 90).

The final part of the book deals with the status of military persons in respect of public law. Under this head the author considers the variation of the obligation to pay the different taxes and imposts levied in the city, state and nation and the right to receive maintenance from the state in the way of pensions or otherwise (pp. 101–129).

The book is written in a clear style and treats an involved subject in a commendably systematic manner. Though some of the details seem of trifling importance, the very minuteness of the statutes in defining the privileges and obligations appertaining to the military status serves, in itself, to give a clearer insight into the result reached in the organization of the modern type of the military state.

ARTHUR K. KUHN.

Die Schiffsgewalt des Kapitäns und ihre geschichtlichen Grundlagen. By Dr. Otto Weber. J. C. B. Mohr: Tübingen. 1907. pp. viii, 81.

The master of a merchant ship is subject to obligations and is invested with powers which cannot be ascribed merely to the express or implied will of the owners of the ship, or of the cargo. It is true that certain of his powers to deal with the ship and cargo and part of his authority over the crew and passengers may be sustained upon the ordinary principles of commercial law, but the author insists that many of the acts of the master may be justified only upon the basis of a direct investiture with part of the authority of the state.

It is this extraordinary power which the author seeks to analyze in the light of history and to define in detail in accordance with German law. The origin of the master's powers is ascribed to the early customary practice of seamen which long antedated the earliest writings concerning maritime usages (p. 34). The author seeks to describe the variations in the powers of the master during the period of state organization, according to the respective laws of the states and maritime municipalities. The period of variance continued to the beginning of the nineteenth century. From that time a period of greater uniformity set in, due to the increase of maritime intercourse.

The modern tendency is in the direction of an extension of the master's powers, at least in Germany. The author cites the *Seemansordnung* of 1902 as the most recent revision of German maritime law. In this, the master is given the long sought title of "Captain," by way of final recognition of a shipboard hierarchy (p. 64).

The author sees in this enactment a confirmation on the part of the legislative organs of the German state, of certain theories in respect of maritime commerce which he himself approves. The principal proposition for which the author contends is that "ship authority" represents throughout its whole extent but another form of "state authority." The former is the means by which the latter reaches out beyond the territorial boundaries of the state to the most remote parts of the world, for the purpose of protecting the rights and supervising the interests of the subjects of the state. Thus "ship authority" represents "state authority" on the high seas as "consular authority" represents it in foreign territory. For this reason the organs of the state should extend rather than limit the authority of the master and should make him specifically, as he now is in effect, by the operation of the numerous paragraphs distributed throughout the body of the written law, the supreme authority on board ship, with the rights and duties of an administrative officer (p. 32).

The wise regulation of the master's powers is, in the opinion of the author, not a matter of merely national concern but it is also one of international obligation. The duty of the state to maintain an orderly intercourse between itself and other nations by means of ships flying its flag can only be completely fulfilled by delegating to some person the authority to act on board ship in the name and subject to the orders of the government. During the voyage and especially during sojourns in foreign ports there is the possibility of conflict with the state authority of a foreign nation. For the actions of these aboard ship the foreign state will hold the home state responsible and the home state may meet this responsibility fully only by a corresponding control over ship authority through wise provisions of its public maritime law (p. 63).

The author does not say that such a claim has ever been made and, in fact, it is extremely doubtful whether it is recognizable in international law. The book is remarkably barren of actual cases or illustrative examples and demonstrates the inadequacy of accepting the written law as the sole guide and applying to it metaphysical argument.

In the historical portion of the book (pp. 34–61) the author has of course laid particular stress on the development of the law in Germany. He has also, however, briefly sketched the legislation of other nations as well. He seems to approve the provisions of our own "Harbor Act" whereby the master is prohibited from covenanting any limitation of responsibility for loss or damage from negligence, fault, or failure in

loading, stowage, custody, care, or proper delivery of property committed to his care. The author sees in this a corresponding extension of the immediate control of the master over the goods and hence in line with his main argument.

As is well known, the act is fundamentally different from the law of his own country, where the freedom of contract has not been limited, but there is discernible a tendency to legislate there and elsewhere along similar lines (see Report of Proceedings of International Law Association, Christiania Meeting, 1905, p. 183).

ARTHUR K. KUHN.

Modern Constitutions. By Walter Fairleigh Dodd. Chicago: University of Chicago Press. 1909. 2 vols. pp. 351, 334. Price, $5.42, pp.

"A collection of the fundamental laws of twenty-two of the most important countries of the world," has just appeared, edited with historical and bibliographical notes by Mr. Walter F. Dodd. Important in constitutional law as are the various documents here printed in translated form with the historical and critical notes necessary to their understanding, they are nevertheless important in international law, because the conduct of foreign affairs depends in no small measure upon the internal and constitutional machinery, and in many cases the rights assured and guaranteed to the foreigner are measured by the constitution and administered in accordance with its provisions by courts of justice or appropriate organs. A foreign nation may be presumed to contract with full knowledge of the constitutional provisions of the state with which it enters into relations, but as international law stops at the threshold and international organization can not well be considered by the foreign country, the importance of a correct and thorough understanding of the constitution and laws of any nation is fundamental because it enables treaties and conventions and informal agreements to be drawn in such a form as to secure their execution without raising embarrassing constitutional questions.

Mr. Dodd prints the constitutions of the following states: Argentine, Austria-Hungary, Belgium, Brazil, Chile, Denmark, France, Germany, Italy, Japan, Mexico, Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland, United States. In addition he includes the Constitutional Act of the Commonwealth of Australia, the British North American Act of 1867, and the subsequent legislation which federated

Canada. The student is thus enabled to study not merely the constitutions of independent political unities, recognized as the persons of international law, but to trace the gradual and necessary steps by which self-governing communities assume constitutional and it may be international standing. In the same way the Austrian and the Hungarian constitutions, as well as the Austria-Hungarian law concerning internal and international affairs are set forth.

To each constitution Mr. Dodd prefixes a brief but adequate historical introduction, and follows it with a select bibliography of the leading works dealing with the constitutional law of each of the countries represented. Mr. Dodd has examined personally the literature and where he has been unable to examine the works cited he indicates, as in the case of Mexico (p. 39), that they "have not been examined by the editor but they are referred to in high terms" by competent authority. Where necessary to a correct understanding of the text Mr. Dodd has added a note and furnished cross-references.

An index at the end of the second volume places the contents of the work at the disposal of the reader and student, and even a casual examination of the index shows the importance of the work to the student of international law. It is to be hoped that the success of the work will encourage Mr. Dodd to prepare companion volumes including the constitutions of the countries not represented in the present collection.

JAMES BROWN SCOTT.

Effects of War on Property. By Almá Latifi, M. A., LL. D. With a note on belligerent rights at sea by John Westlake, K. C., LL. D., D. C. L. London: Macmillan and Co. 1909. pp. 152. $1.50 *net.*

The present volume, consisting of 143 pages with a note on belligerent rights at sea by Westlake (pages 145–153), is a careful and thoughtful examination of the effects of war on property whether it be real, personal, mixed; whether it belong to the enemy or be neutral; whether it be situated upon land or upon the high seas. The view-point of the author is that of Anglo-American jurisprudence. He rejects the theory announced by Rousseau, applied by Portalis, and supported by an array of recent authority, that war is solely a relation between states, preferring the older doctrine that enemy character of the subjects is determined by the action of the state.

Mr. Latifi likewise rejects the theory of nationality which is advanced by the continent as the test of enemy character and prefers the time-

honored and carefully developed doctrine of American and English courts of justice that enemy character is determined by domicile. Mr. Latifi also repudiates the immunity sought to be extended to private property of the enemy upon the high seas, and in pages 116–143 gives many and weighty reasons why the doctrine promulgated by Abbé de Mably in his *Droit public de l'Europe, fondé sur les traités* (1748), approved by Saliani in his treatise on the *Duties of Neutrals* (1782), and championed by the United States, should not be accepted. In this view Professor Westlake concurs.

Mr. Latifi's subject is a very broad one, involving as it does, the complex effects of war upon property, but complicated and difficult as it is, the work is handled clearly, carefully, in the light of principle and authority, adjudged cases are very frequently quoted, and there are numerous references to the works of authority. Mr. Latifi's volume is therefore to be commended to the profession.

JAMES BROWN SCOTT.

Pacific Blockade. By Albert E. Hogan, LL. D., B. A. Oxford: Clarendon Press. 1908. pp. 183.

Mr. Hogan's monograph on pacific blockade is a very welcome contribution to a recent subject bristling with difficulties, which, although frequently applied by nations to their inferiors and recognized as legitimate by their superiors, cannot be said to have met the criticism of critics in such a way as to become an institute of international law. And yet it is difficult not to recognize the doctrine of pacific blockade. If nations have the right to compel the settlement of controversies by a resort to war, they most assuredly possess the right to force adjustment by less drastic measures on the simple theory that the greater includes the lesser right.

It is always within the province of the blockaded state to refuse to recognize the pacific nature of the proposed blockade, and to treat its institution as an act of war, whereupon the blockade becomes legitimate and extends not merely to the blockaded port but to neutral nations. Thus viewed the question is one between the two countries. A very serious difficulty arises when the pacific blockade is extended to neutral nations, for it may well be that neutral nations are willing to recognize the blockade as an act of war but withhold recognition from it as a pacific instrumentality. It is true that war imposes restrictions upon neutrals,

but at the same time it recognizes neutral rights and duties placed upon the belligerent. Whether or not a neutral nation accepts the legitimacy of a pacific blockade would seem to be a matter of policy as well as of international law.

Mr. Hogan examines very carefully (pages 11–72) the theory and practice of pacific blockade from its inception in 1827 to the Venezuela blockade of 1902–3. In the second part of his monograph (pages 73–157) he gives an admirable historical account of the various blockades, and in an appendix (pages 159–183) he collects the various notices of pacific blockade issued by the blockading powers. On pages 70–72 he sets forth his conclusions on the entire subject, which, as they are the result of a careful, painstaking examination, deserve quotation:

1. Any state or states may blockade the coasts and ports of another state in time of peace to coerce the latter into acting in accordance with the wishes of the blockading state or states.[1] If the state whose coasts or ports are blockaded is not prepared to regard the blockade as an act of war, the blockade is termed pacific.

2. It is usual to warn the state to be blockaded of the impending blockade.

3. If vessels flying the flag of any state other than those blockading or blockaded are to be interfered with in any way, notice of the blockade must be given to the state whose flag they fly. It is also usual to give a separate warning to each particular vessel before any action, other than that of turning such vessels away, is taken with regard to them.

In such cases, vessels flying the flag of any state other than those blockading or blockaded, which are in the port blockaded at the time of the institution of the blockade, must be given a reasonable time to leave such port without interference from the blockading squadron.

4. The blockading state may treat vessels flying its own flag in any way it thinks best.

5. It is desirable that the blockade should be effective.

6. The blockade need not be universal, but may be confined to some particular commodity or commodities, or to the vessels of the state blockaded.

7. As a general rule all vessels flying the flag of the state blockaded, which have been seized during the blockade, must be handed back on the raising of the blockade; but —

(a) Where the demands made on the state blockaded, being of a pecuniary character, have not been satisfied, such vessels may be retained to satisfy them.

(b) Where any damage has been done to such vessels there can be no claim against the state or states blockading to make good such damage.

[1] Mr. Hogan notes: "This must now be read subject to the provisions of the 'Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts,' which embodies the 'Drago' doctrine, and was agreed to at the second Hague Conference, 1907." See Supplement, 2:81.

(c) In exceptional cases, where the blockade is directed against some practice, such as slavery, which is contrary to international morality, any vessels seized which are engaged in such practice may be condemned.

8. Vessels flying the flag of any state other than those blockading or blockaded may not be interfered with except —

(a) In cases where the blockade has been instituted by the Concert of Europe.

(b) With the consent of the state whose flag they fly, such consent to be implied in the absence of any protest from such state.

9. Where, under the exceptions to the last preceding rule, interference with vessels flying the flag of a state other than those blockading or blockaded is permissible, such interference must not go beyond the detention of such vessels during the existence of the blockade.

An elaborate bibliography (pages 7–10) precedes the treatise and although there is no index, the table of contents and the conclusions above quoted render an index unnecessary. It is to be hoped that Mr. Hogan's examination of a limited field of international law will encourage the preparation of monographs dealing with various phases of international law so that teacher and student may no longer be forced to foreign literature or to consult general and therefore inadequate treatment of various doctrines as given in text books aiming to cover the entire field of international law.

JAMES BROWN SCOTT.

La Segunda Conferencia International de la Paz. By Dr. Fernando Sanchez de Fuentes. Habana: Imprenta Avisador Comercial. 1908. pp. 38.

The author of this pamphlet was the secretary of the Cuban Delegation to the Second Hague Conference. The pamphlet is a reprint of an article published in the "Revista de la Facultad de letras y ciencias," and is practically a clear, unbiased statement of the actual happenings at The Hague, reported as it is presumed the secretaries of all the delegations reported the daily events to their respective governments. It is a colorless diary of the plenary sessions, followed by a sketch of the work of each of the commissions, and the various subcommissions. As a brief, straightforward sketch of the work, which one can easily understand, and from which one may, without the labor of perusing the three weighty volumes of *procès verbaux,* secure a bird's-eye view of the Conference, the pamphlet is to be recommended.

Bibliographie du Droit International. By Le Marquis de Olivart, Associate Member of the Institute of International Law. Third volume. Paris: A. Pedone. 1908.

We have already noted (*2*:250) the appearance of the first two volumes of this work, and the third has now come from the press. It covers the period from December 1, 1906, to August 20, 1908, and follows the plan of the preceding fascicules, adding to the already seemingly exhaustive list of books, monographs, magazine articles, etc., which they contained. A fourth and final volume was, according to a note in the third, promised before the end of 1908, but it has not reached us as yet.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

(For table of abbreviations used, see Chronicle of International Events, p. 465.)

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THE RELATIONS BETWEEN INTERNATIONAL TRIBUNALS OF ARBITRATION AND THE JURISDICTION OF NATIONAL COURTS[1]

The growing tendency towards international arbitration brings into special consideration and importance the relation between the jurisdiction of national courts of justice and international tribunals of arbitration.

When one nation urges claims in behalf of its citizens upon the government of another nation and proposes arbitration, how far does that other nation's respect for its own independent sovereignty and for the integrity of its own judicial system require it to insist that the claims be submitted for final decision to its own national courts?

The true basis for the consideration of this question is in the nature of the obligation which constrains a nation to submit questions to any tribunal whatever.

That there is no legal obligation to make any submission, that is to say, that it is not required by any rule imposed by a superior power, is a corollary from our conception of sovereignty. Sovereignty involves the right to determine one's own actions — to pay or not to pay, to redress injury or not to redress it, at the will of the sovereign, subject only to the necessary conditions created by the existence of other equally independent states. So far as questions arise out of contract, Alexander Hamilton states the strongest view of national freedom from restraint in a passage often quoted in recent years:

> Contracts between a nation and private individuals are obligatory, according to the conscience of the sovereign, and may not be the object of compelling force. They confer no right of action contrary to the sovereign will.

[1] Opening address by Honorable Elihu Root, president of the American Society of International Law, at the third annual meeting of the society, in Washington, April 23, 1909.

So far as questions arise out of alleged wrongs by one government against a citizen of another, the sovereignty of one nation is merely confronted by another sovereignty, which is itself equally supreme within its own limits. Wherever the true lines are to be drawn between two mutually exclusive sovereignties, each is supreme and subject to no compulsion on its own side of the line. Wherever there is infringement by one on the other there exists the right of adverse action, which involves no impeachment of independent sovereignty, but follows necessarily from the contact of two independent powers. Whatever modifications international lawyers urge to the broad statement of doctrine to which Doctor Calvo has given his name, so ably enforced by his successor, Doctor Drago, there is no effective dispute regarding the foundation of his main proposition, regarding the essential nature of sovereignty.

The conditions under which this sovereign power is exercised among civilized nations do, however, impose upon it important limitations, just as the conditions under which individual liberty is enjoyed in a free civil community impose limitations upon individual conduct in matters not at all controlled by law. Municipal law does not, in general, undertake to compel men to be virtuous, truthful, sober, fair, polite, and considerate of others. Yet the existence of civil liberty is conditioned upon the existence of a community standard of conduct quite independent of legal compulsion, and extending far beyond the limits touched by any statute. The member of a community who chooses to use his individual liberty to violate that standard conspicuously, meets severe punishment in the loss of respect, confidence, and esteem, and in the consequences of that loss. Another very effective limitation upon conduct is the knowledge that certain courses of conduct quite within one's legal rights may lead some other man to use his individual freedom, to do one injury. The compulsion which such considerations produce upon individual action is no more an infringement upon individual liberty than is the effect caused by the knowledge that fire will burn and water will drown. The individual in each case regulates his own conduct in accordance with his own will.

The assertion of independent sovereignty of nations is but another

expression of the individual liberty of each nation in the community of nations. In its practical application it is of modern acceptance, superseding the old idea that each nation, tribe, or group of people under whatever chieftain, leader, sovereign, or government, was entitled to hold such territory and exercise such control over its own conduct, as it could maintain by force of arms, and no more.

The theory of independent sovereignty, entitled to be respected by all mankind without regard to its power to maintain itself by force, could find no place in the world except in coincidence with a standard of international conduct to which the nations generally, in the exercise of their individual sovereignty, conform, each without compulsion of any other power, but voluntarily.

The chief principle entering into this standard of conduct is that every sovereign nation is willing at all times and under all circumstances to do what is just. That is the universal postulate of all modern diplomatic discussion. No nation would for a moment permit its own conformity to the standard in this respect to be questioned. The obligation which this willingness implies is no impeachment of sovereignty. It is voluntarily assumed as an incident to the exercise of sovereignty because it is essential to a continuance of the conditions under which the independence of sovereignty is possible. This obligation is by universal consent interpreted according to established and accepted rules as to what constitutes justice under certain known and frequently recurring conditions; and these accepted rules we call international law. No demand can ever be made by one nation upon another to give redress in any case but that the demand is met by an avowed readiness to do justice in that case, and upon that demand in accordance with the rules of international law. No compulsion upon sovereignty is needed to reach that result.

The only question that can arise upon such a demand is the question, "What is just in this case?" In that necessary condition of agreement upon the underlying principle to be followed, a common duty is presented to both nations to ascertain and determine what is just.

It is not usually a simple or easy thing to determine what is just as between a nation and either its own citizens or the citizens of

other nations. Upon one conclusion all civilized nations are in accord — that the executive and administrative officers of government can not be depended upon to make such determinations. Civilized nations uniformly provide machinery for judicial decision of such questions so that the views of executive and administrative officers in rejecting claims may be reviewed and controlled. The grant of jurisdiction to courts or the creation of courts to exercise such jurisdiction is no disparagement of the officers whose views of what is just are thus called in question. Sovereigns and presidents and ministers and department officers are not insulted by such provisions, or because the common sense of justice recognizes that their relation to the questions which arise between the government which they conduct, and others, is such that they can not well be impartial.

The whole system by which sovereign states permit themselves to be sued in courts vested with jurisdiction for that purpose is in recognition of the fundamental rule of right that none shall be a judge in his own case.

The same great rule cannot be ignored when the question is whether the decision of a national court is to be taken as a final and satisfactory determination of what is just in an international case, to which the judge's own country is a party. For after all judges are but men. They are part of the government that is called in question. They are subject to the influence of their environment. They can not always escape all the influences of popular feeling and prejudice in their own communities. The political fortunes of the very officials who appointed them to the bench or their own tenure of office may perhaps be at stake upon their action. They cannot help bringing to the bench strong tendencies and predilections in favor of their own countrymen's ways of acting and thinking. They desire the approbation of their fellow citizens, and in cases of public interest it may be much harder to decide against than for, their own country. It is difficult for a foreigner to understand and avail himself of their modes of reasoning, their rules of evidence and of procedure, and the precedents they follow. If there is a difference of languages a stranger is at a great disadvantage. He may often lose his case through not knowing how to do his part towards maintaining it.

There are many circumstances varying in different countries and in different cases which tend to strengthen or to weaken these obstacles to a satisfactory attainment of justice. The general state of feeling in the country of trial towards the country of the complainant and its effect upon the atmosphere of the court room, that every experienced lawyer knows to be so important, is one of these circumstances. The relative importance of the case in proportion to the resources of the country — whether an adverse decision would make a slight or a great difference to the government or the people, is another. Whether the action of the executive has been generally discussed and has assumed political importance is another.

Every country is entitled to follow its own judgment and is not subject to criticism for following its own judgment, as to the degree of independence it shall give to its judiciary, yet it can not well be denied that with human nature as it is, there is less certainty of an impartial decision from judges removable at will in a case calling in question the acts of the appointing and removing power, than from judges whose tenure of office is not dependent upon the executive. The decision of such a dependent court is liable to be affected by the same infirmities which the whole world recognizes as making the determination of the executive itself, an unsatisfactory method of concluding the search for justice.

It should not be forgotten that it is not only desirable to have justice done; but also to have men believe that justice is done. That belief is important to respect for law among the people within each nation and to the maintenance and growth of respect and friendship between the peoples of different nations.

Of course there are many cases falling naturally into the ordinary routine of national judicial procedure — cases plainly not presenting the elements of prejudice which would prevent reaching justice through that procedure. Of course there are many great international questions which no one would ever propose to lay before a national tribunal. Between these two extremes there is a wide range of cases in which national courts may exercise jurisdiction, but to which the considerations that I have suggested apply. When such cases arise the international question is not one of compulsion or derogation from sovereignty, but it is: How shall two nations

desiring to ascertain what is the truth of justice in this case reach a decision? By what procedure and before what tribunal can that end best be attained?

If recourse to arbitration is a reflection upon national courts, the people of the United States have been strangely obtuse, for nowhere in the world, surely, is greater honor paid to the courts of justice, yet we have embodied in the fundamental law which binds our states together a recognition of the liability of courts to be affected by local sentiment, prejudice, and pressure. We have provided in the third article of the Constitution of the United States that in controversies between states or between citizens of different states the determination of what is just shall not be confined to the courts of justice of either state, but may be brought in the Federal tribunals, selected and empowered by the representatives of both states and of all the states — true arbitral tribunals in the method of their creation and the office they perform.

Alexander Hamilton explains this provision in *The Federalist* in these words:

> The reasonableness of the agency of the national courts in cases in which the state tribunals can not be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the slightest interest or bias. This principle has no inconsiderable weight in designating the Federal courts as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between the citizens of the same state. Claims to lands under grants of different states founded upon adverse pretension of boundary are of this description. The courts of neither of the granting states could be expected to be unbiased. The laws may have even prejudged the question and tried the courts down to decisions in favor of the grant of the state to which they belonged. And where this has not been done it would be natural that judges as men should feel a strong predilection to the claims of their own government.

The whole world owes too much to the Constitution of the United States to think little of its example. Especially the American nations, which have drawn from that great instrument their forms of government and the spirit of their free institutions, must regard with respect the lesson which it teaches.

The proud independent sovereign commonwealths like Virginia and Pennsylvania and New York and Massachusetts, which formed the American Union, revered their judges. They were prepared to give, and did give to their courts a degree of authority over them and over their executives and legislatures without precedent in the history of free government; but they also revered justice; they prized peace and concord and friendship and brotherhood between the states and their citizens. A century and a half of free self-government had brought to them the lessons and the self-restraint of experience. They knew the limitations of good men and the essential conditions of doing justice. In that great cause they allowed no small local jealousies to bar the way. When the ever-recurring question arises between submission of controversies to international arbitration on the one hand and insistence upon the jurisdiction of national tribunals on the other, the nations who look to the framers of the American Constitution as an example of high constructive statesmanship and wisdom, should not fail to find in this judgment, matter to arrest their attention and influence their action.

No court in the world has greater power and independence and honor than the Supreme Court, established under the Constitution of the United States, yet our government, by international agreement, has submitted to international tribunals many cases which could have been, and many cases which already had been, decided by that great court. For example, the cases of the Peterhof, reported in Wallace's Reports, Volume 5; the Dashing Wave (5 Wallace); the Georgia (7 Wallace); the Isabella Thompson (3 Wallace); the Pearl (5 Wallace); the Adela (6 Wallace), had all been decided by the Supreme Court, and they were resubmitted to an international tribunal, which decided them in the same way the court had decided them.

The cases of the Hiawatha (2 Black), the Circassian (2 Wallace), the Springbock (5 Wallace), the Sir William Peel (5 Wallace), the Volant (5 Wallace), the Science (5 Wallace), had all been decided by the Supreme Court, and they were resubmitted to an international tribunal, which decided them adversely to the decisions of the court, and the United States complied with the decisions of the arbitral tribunal.

It is true that the rule is undisputed that where there has been a denial of justice in national courts their decisions are not to be held conclusive, and arbitration or other further action may be called for. Unfortunately it has been necessary often in the past to invoke this rule; but it is an unsatisfactory rule and injurious in its effects. It involves an indictment and trial of the judicial system under which the denial of justice is alleged to have occurred. It involves aspersions upon government, imputations upon high officials, incitement to anger and resentment. and tends to destroy rather than to preserve good feeling and friendship between the nations concerned.

The better rule would be, to avoid the danger of denials of justice, and to prevent the belief that justice has not been done, which must always possess the parties defeated in a tribunal suspected of partiality, by submitting in the first instance to an impartial arbitral tribunal all such cases as are liable to be affected by the considerations I have mentioned.

And the reason of such a rule would require that when such cases have been decided already by national courts, and the impartial justice of the decision is seriously questioned, upon substantial grounds, they should be resubmitted to an arbitral tribunal, not for proof that justice has been denied, but for rehearing upon the merits because self respect and intelligent self-interest forbid a nation to shelter itself behind decisions of its own courts that rest under the imputation of partiality, or to be content with any but the best means and the most sincere effort to learn what is just in order that the nation may do what is just.

ELIHU ROOT.

HOW CHINA ADMINSTRATES HER FOREIGN AFFAIRS

The foreign relations of China may be said to begin with the year 1689, when the first treaty, consisting of six articles, was concluded with Russia at Nerchinsk. Although several embassies from Europe made their way to China by land and sea in the 17th and the 18th centuries, regular diplomatic relations were not established till the spring of 1861, when the diplomatic representatives of Great Britain and France took up their residence in the southeastern part of the inner city of Peking, now known as Legation Street. On the 19th of January, 1861, an Imperial Edict was issued, commanding the formation of a new bureau, named the Tsungli Yamên, for the administration of foreign affairs. By the terms of the Protocol of 1901, the Tsungli Yamên was transformed from a bureau or commission into a regularly constituted ministry or department, taking precedence over the then six other ministries of state, and has since been called the Waiwu Pu, or the Ministry of Foreign Affairs.

The foreign relations of China are administrated very much like those of other nations, by the Waiwu Pu at home and by legations abroad. Under the Tsungli Yamên regime there were no bureaus, but the duties of the Yamên were divided according to the nationality which was involved, a secretary with assistants being in charge of each of the important treaty Powers. Over the secretaries were the ministers of the Yamên, three in number at first and subsequently increased to as many as eleven. The senior minister, or member, was some prince, and the body was spoken of collectively as the Prince and Ministers of the Tsungli Yamên.

As the Waiwu Pu is now organized, there are four bureaus and an office corresponding to that of the chief clerk of the Department of State in the United States. The Bureau of Harmonious Intercourse has charge of treaties, memorials to the Throne from the ministry and from envoys abroad, the appointment of envoys and their staffs, the arrangement of audiences to foreign ministers, the bestowal of

decorations, promotions in the ministry, and local international questions in Peking. A second bureau devotes its attention to questions arising from the engagement of foreign advisers, professors, etc., the emigration of Chinese laborers, the sending of students abroad, etc. Then there is the Bureau of Accounts and Disbursements, and lastly the Bureau of Miscellaneous Affairs (such as boundary questions, foreign travelers, missionary work, etc.). The principal officers of the Waiwu Pu consist of a controller-general (an Imperial prince), two presidents, two vice-presidents, two deputy vice-presidents and two councillors. The two presidents correspond roughly to the secretary and the under secretary of state, the vice-presidents to the assistant secretaries of state, while the deputies and the councillors may be compared to confidential secretaries and the solicitors of the department of state. The controller-general directs the general policy and is consulted only on important questions.

While naturally a large amount of the work is carried on by the exchange of *chao-huis* ("notes"), two days a week are set apart by the Waiwu Pu for receiving visits from foreign representatives. By the treaty of Nanking, it was stipulated that foreign officials addressing Chinese officials of equal rank should use the form *chao-hui* (usually translated "despatch"), but when corresponding with authorities of higher rank than themselves should employ the term *shen-ch'en*. This implied subordination was abandoned by the terms of the Chefoo Convention, and now the *chao-hui* is the usual form of communication between Chinese and foreign officials. The *chao-hui* is very formal, and in place of any signature, the seal of the ministry or bureau is attached. When the correspondence is of a personal or semi-official nature, there may be no signature, but the communication ends with the expression "visiting card is enclosed."

Prince Ch'ing, who was the senior member of the Tsungli Yamên, has been the controller-general of the Waiwu Pu ever since its establishment in 1901. The two presidents are Their Excellencies Na T'ung, who proceeded to Japan as special ambassador in July, 1901, and Liang Tun-yen, an alumnus of Yale University. One of the vice-presidents, His Excellency Lien Fang, and Deputy Vice-President Wu Chung-lien, are well-known French scholars, for some years

secretaries of the Chinese Legation in Paris. Their Excellencies Chang Yin-t'ang and Chou Tsz-chi, a deputy vice-president and a councillor respectively, were both connected at one time with the Legation in Washington. The junior councillor, Mr. Tsao, is a returned student from Japan.

The Chinese diplomatic service came into existence in the year 1867, when in response to a memorial presented to the Throne by the Tsungli Yamên, an Edict was issued, which invested Chi Kang and Sun Chia-ku with the powers and dignity of traveling envoys, and which commanded them to proceed to the foreign countries with which China had treaty relations. This event is of interest to the United States in that Mr. Anson Burlingame, who had been the American Minister in Peking, accompanied the legation as the third envoy.

Beginning with the first year of Kuanghsü (1875), resident envoys extraordinary and ministers plenipotentiary have been appointed, the number at first being limited to only two, one accredited to Great Britain and the other to the United States, Spain and Peru. The number has been gradually increased till at the present day, besides the two already mentioned, China sends representatives to Japan, Germany, France, Russia, Italy, The Netherlands, Austria-Hungary, Belgium and Korea (given in order of priority of establishment), the last of whom has been withdrawn since the Russo-Japanese War. When the legations were first established, one minister was generally accredited to more than one government. For instance, the minister to the Court of St. James, first appointed in 1875, was in 1878 further accredited to France, and his duties were again increased in 1880 by representing the Imperial Government in St. Petersburg. At one time (1885–8) one envoy was accredited to as many as six different countries, namely, France, Germany, Italy, The Netherlands, Austria-Hungary and Belgium. With the exception of the minister at Washington, who is also accredited to Mexico, Cuba and Peru, and that at Paris, who has chargés in Madrid and Lisbon, the Chinese representatives no longer perform the duties of pluralists. The protection of Chinese subjects and their interests in Central and South American countries has been intrusted, at the request of our government, to American diplomatic and consular officers.

The first Envoy Extraordinary and Minister Plenipotentiary at Washington was His Excellency Chen Lan-ping, who had as assistant envoy, Dr. Yung Wing, and they were presented to the president of the United States by secretary of state the Hon. William M. Evarts in the latter part of September, 1878.

The duties of our diplomatic and consular officers are in no wise different from those of such officers of other nationalities. They are further charged, however, with the work of supervision of government students, of the purchase of machinery and other things, of engaging foreign teachers and other professional men, and of studying and reporting on the institutions of the different countries.

Generally speaking, the present ministers were secretaries of legations in former days. Before the Waiwu Pu promulgated its New Rules, with each change of the head of mission, the members of his staff and the consular officers in his jurisdiction likewise gave up their posts. But as the Tsungli Yamên gained in efficiency and prestige, by being transformed from a commission into a regular ministry of state, so by the new system, the members of our diplomatic and consular services are no longer tentative servants, protegés and dependents of the heads of missions, but are substantive officers, on a similar footing to the important officials in the home administration. The manner of appointment of heads of missions is as follows: the Waiwu Pu submits to the Throne a list of candidates for a vacant post and His Majesty draws a circle with his vermilion pencil around the name of the candidate whom he approves. The appointee then presents to the Waiwu Pu a list of the names of men, whom he recommends to fill the post of chargés, secretaries, attachés, consuls, etc., and the same, with or without additions and changes, is submitted by the ministry to the Throne for ratification. By the New Rules, a change of minister need not affect the members of the mission. The aim of the Rules is to build up a regular diplomatic and consular service and to make the officers appointees of the ministry rather than those of the minister.

The heads of missions receive very fair salaries and liberal allowances for office expenditures and for purposes of entertaining. Salaries begin with date of entrance into office, and remittances are

made quarterly. Besides passage money for himself and family, each officer is allowed three months' salary for "outfit." The legation in Tokio enjoys the same allowances as those in more expensive capitals.

Our diplomatic and consular services are now, therefore, subordinated to the Waiwn Pu, though envoys have, of course, the right to present memorials to the Throne. Despatches and correspondence from legations abroad are addressed as a rule to the deputy vice-presidents or the councillors; routine ones are inscribed simply to the ministry.

A school for the training of diplomats, known as the Hsuts'ai Kuan, has been established in Peking, and it will no doubt be largely drawn on for recruits for the foreign service. Attached to every legation may be found students, earnestly striving to study the institutions of the country in which they reside.

From time to time special embassies have left Peking, the last one being that of His Excellency Tong Shoa-yi, but as yet China has no resident ambassadors abroad.

Recent consular establishments have been located at Melbourne (Australia), Wellington (New Zealand), Rangoon (Burmah) and Vancouver (B. C.).

Powers that maintain legation establishments in Peking are Austria-Hungary, Belgium, France, Germany, Great Britain, Italy, Japan, Mexico, The Netherlands, Norway, Portugal, Russia, Spain and the United States. The Swedish Minister in Tokio is also accredited to Peking. Cuba, Denmark, and Nicaragua have consulates-general in the port of Shanghai, but in the case of Cuba the consul-general is also chargé d'affaires.

The distinctive feature of China's administration of foreign affairs is not found abroad but at home. By the treaties which she concluded with the Powers, she has consented to their practice of the principle of extra-territoriality within her dominions. That is to say, she has surrendered her right of jurisdiction over the person and to a certain extent over the property of foreigners upon her land and waters. At the same time the responsibility of protecting them and their property remains an obligation on the Chinese government, making it a double hardship.

Article XV of the treaty of 1858 with Great Britain provides that "All questions in regard to rights, whether of property or person, arising between British subjects, shall be subject to the jurisdiction of the British authorities," and this principle of extra-territoriality is further elaborated as a part of section II of the Chefoo Convention. The latter reads, " Chinese subjects who may be guilty of any criminal act towards British subjects shall be arrested and punished by Chinese authorities according to the laws of China. British subjects who may commit any crime in China shall be tried and punished by the Consul, or any other public functionary authorized thereto, according to the laws of Great Britain." The text goes on to state that to fulfil the treaty obligations, " the British Government has established a Supreme Court at Shanghai, with a special code of rules. * * * The Chinese Government has established at Shanghai a Mixed Court." A subsequent passage provides that " whenever a crime is committed affecting the person and property of a British subject, whether in the interior or at the open ports, the British Minister shall be free to send officers to the spot to be present at the investigation." Under the " favored nation clause," other foreign nations having treaty relations with China enjoy similar exemptions and privileges for their nationals as provided by the passages just quoted. With the exception of Great Britain and the United States, which have established courts according to the regular judicial systems at home, the other treaty powers exercise their judicial functions in China entirely through consular officers.

The situation is further complicated by the existence of the so-called " settlements." Originally tracts of land rented to foreign communities at the treaty ports for their exclusive residential and trading purposes, several of the settlements have become centers of Chinese population. The International Settlement of Shanghai has, for instance, a population of half a million, and of this number only eleven thousand are foreigners. At the same time, the settlement is for practical purposes under the control and rule of the Consular Body and the Municipal Council, a body of nine men (seven British, one American and one German) elected annually by the foreign taxpayers of Shanghai. " The regulations for the police and fiscal

government of the city, as well as those providing for the election of a municipal council and its duties, are drawn up by the consular body and approved by the diplomatic body in Peking; they then are the statute law of Shanghai." The International Mixed Court of Shanghai sits every morning to hear cases, in which the municipal police or foreigners (non-French) are prosecutors, and a foreign vice-consul is present as assessor. The latter has only the right to watch the proceedings, and in case he is dissatisfied with the findings of the Chinese magistrate, to report to his government. In the evenings, the magistrate sits by himself to adjudge litigation between Chinese residents in the Settlement which does not involve in any way foreign interests. In cases where Chinese subjects are charged with grave offenses punishable by death and the various degrees of banishment, the District Magistrate (of the Chinese City) and not the Mixed Court has jurisdiction.

The powers of the Mixed Court Magistrate are further limited in the matter of arresting his own nationals in the Settlement, which must be done through the agency of the municipal police. Chinese authorities wishing to summon or arrest their subjects who happen to reside in the Settlement must have the papers countersigned by the senior consul, and the arrest made through the foreign police. If the person wanted is in any way connected with some foreign firm or in foreign employ, the warrant must first be approved by the consul of that nationality before the senior consul affixes his signature. Lastly, the arrested person can demand a hearing at the Mixed Court (with the usual presence of the foreign assessor) that his accusation may be decided before being removed from the Settlement. In short, the ambition of the foreign municipal councils is to secure the exemption of *all* residents in the settlements from the jurisdiction of the Chinese government. Over foreigners China has no control whatever, and even over her own subjects in the settlements, her control must be exercised under the supervision of a foreign official.

At the principal treaty ports, there is an office known as the Bureau of Foreign Affairs (Yangwu Chü), the chief of which is generally the Customs Taotai of that port. In civil cases, the procedure is for the foreign complainant to address his consul, who then communi-

cates with the Bureau. The latter summons the defendant and listens to his side of the case. Dispatches fly forward and backward between the consul and the Bureau till some sort of agreement is arrived at. In criminal cases, if the defendant is arrested in the settlements, where no mixed courts have been established, the foreign police prepares the evidence and he is despatched to the nearest district magistrate (with or without the intervention of the Bureau), who inflicts the required punishment. Whenever there is dissatisfaction with the settlement of the case, the consul appeals to the Taotai, or to the viceroy, or even to Peking. In Shanghai the Bureau of Foreign Affairs is the court of appeals from the decisions of the Mixed Court, when the Shanghai Taotai sits as judge, with the consul as assessor. It is also the building where the Taotai receives the calls of the consuls and where he extends social amenities on such occasions as the Emperor's birthday, etc.

It is in the interior of China, hundreds of miles from the nearest consulate or foreign community, that this principle of extra-territoriality, which China granted without being aware of the difficulties that would be involved in its execution or of its being an infringement on her sovereign rights, works with peculiar hardship on the officials and the people. Removed from all fear of the law and caring little or nothing for the good opinion of his neighbors, the foreigner is often tempted to behave in a manner that he would not dare to do elsewhere. Minor offenses in such a case have to be overlooked by his victims, and in serious crimes, the most the local authorities can do is to despatch him promptly under an escort of soldiers to his nearest consul, who after all the expense and trouble taken to transport the prisoner, the plaintiffs and the witnesses may or may not punish him. Sometimes, the indignation of the populace gets beyond control, resulting in an application of "lynch law." Such a course is now, however, rarely attempted for reasons which need not be mentioned here. It is not entirely without cause, therefore, that foreigners are not welcomed in the interior either as residents or as travelers. Fortunately, the majority of such foreigners are either missionaries or travelers. The former are as a rule men of education and character (Protestants are referred to here), who conduct themselves with con-

sideration and restraint, while the latter are few and far between and to the relief of all concerned, do not tarry long at any one place.

It is not possible to omit a passing allusion to the interference of missionaries in purely Chinese litigation. The subject is a delicate and complicated one. Missionaries claim, and sometimes justly, that their converts are being persecuted by the officials or their neighbors on account of their change of belief, while the official tells the non-Christian litigants that he has decided a case against them, not that they have been in the wrong, but that if he decided according to the merits of the case, the foreign missionary would appeal to the Governor or to Peking, and he would suffer. It is gratifying to note that the Protestant missionaries have agreed to make it their policy to interfere as rarely as possible in litigation in which converts are involved, and only when they have made full investigation and possess perfect knowledge of the facts that they would carry a case before the officials. Increased intelligence, both official and popular, in dealing with such cases, the rise of a better class of converts and the growth of the daily press are further correctives to put a stop to one of the most irritating international problems that China has had for many years.

While theoretically a Chinese has always a mode of redress against a foreigner by suing him before his consul, there are in practice many difficulties in the way. Granting that the consul is an upright and honest official, which is not always the case, he is very likely a friend of the accused (in small communities one cannot be fastidious in choosing friends). Then there is the language difficulty, the differences in court procedure, the lightness of Western compared with Chinese punishment, and the intricacies of Western law, which are very bewildering to a Chinese plaintiff. A very serious objection and a reasonable cause of complaint is the practice of some consular courts to send prisoners charged with major offenses to their home lands for final trial and punishment. As a rule, very few hear further of such cases, and the report is circulated and believed that such criminals go unpunished. This practice should be abandoned, for it does injustice to both sides, damaging the good name of the foreign country and robbing the Chinese of the satisfaction of knowing that punishment has been meted out to the guilty.

It is recognized by our government that the management of foreign affairs in China constitutes its most important and most difficult work, and to simplify matters and to increase efficiency, it proposes to appoint commissioners of foreign affairs for each province, who shall supersede the regular administrative officers, — already burdened with their other duties. These commissioners, assisted by inferior officers to be located at each treaty port and each missionary center, will be made responsible for the settling of foreign questions, and will be in direct communication with and under the absolute control of the Waiwu Pu.

In the commercial treaties recently negotiated with Great Britain, the United States and Japan, the following article was incorporated:

> China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain (United States or Japan) agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing.

To bring the article in question into effect as soon as possible, China is having her laws remodelled and her prison system ameliorated. The judicial functions are gradually being removed from the sphere of administrative officers, and courts, based on the principles of the West, have been established in some of the more important cities. With the abolition of the practice of the principle of extraterritoriality, the administration of foreign affairs in China will be greatly simplified and much more friendly relations will exist between our people and the foreigners.

Weiching W. Yen.

THE INFLUENCE OF THE LAW OF NATURE UPON INTERNATIONAL LAW IN THE UNITED STATES[1]

The political philosophers of the eighteenth century might have been surprised if told that their favorite doctrine of natural rights was the intellectual successor of certain theories of the Roman law and of the scholasticism of Saint Thomas Aquinas. Yet the "state of nature," which filled so large a place in the discussion of natural rights, has been called "an exaggerated perversion of what, in traditional system, was quite a subordinant point."[2] From Locke to Hooker, and back through the scholastic philosophy, the germ of natural rights has been traced to the *jus naturæ* and the *jus gentium* of the Roman law. Grotius and his successors preserved the tradition in another and more direct line. The continuity of Grotius with the doctrine of the Roman law was complete.[3] "The law of nature," said Holland, "is the foundation, or rather the scaffolding, upon which the modern science of International Law was built up by Gentilis and Grotius.[4] The change in the meaning of *jus gentium* made by Grotius and his successors, and the influence which the *jus naturæ* had in forming the new conception of the law of nations can only be referred to here.

There has been much confusion attendant upon the discussion of this change and influence, and there is no desire on the part of the writer to make what was once confusion again confounded.[5]

It will be the purpose of the present paper to consider the in-

[1] A paper read at the meeting of the American Political Science Association, held at Richmond, Virginia, December 31, 1908.

[2] Sir Frederick Pollock, Note G to his edition of Maine's Ancient Law. Carlyle, Mediæval Political Theory in the West, I, Chap. 9.

[3] Pollock's Maine's Ancient Law, Note H.

[4] Jurisprudence, 10th Ed., 38.

[5] "Mr. Bryce's recent essay on the Law of Nature should be read by all students of legal history," says Sir Frederick Pollock, in his note (page 387). To it may be added the latter's article upon the same subject in the Journal of Comparative Legislation, 1900.

fluence of the Continental text-writers upon the early American conceptions of the law of nations. The more one looks for definite statements by the revolutionary statesmen and their successors of principles drawn wholly from the law of nature, the more one loses the trail, and, indeed, one's sense of direction. All that can be done is to point out the extent to which the text-writers were read and used, to attempt to see how far their habits of thought and expression were adopted in America, and, finally, to single out certain counter-influences which made against any large adoption of the law of nature in America.

The case of *Triquel v. Bath* (3 Burrows, 1478) is frequently referred to for the purpose of showing how far the law of nations is a part of the law of England. In that case, decided in 1764, Lord Mansfield (on the authority of Lord Holt) expressed the dictum that "the law of nations was to be determined from the practice of nations and also from the authority of Grotius, Barbeyrac, Bynkershoek, Wicquefort and others, there being no English writer of prominence upon the subject." It will not do to press this frequently quoted dictum too far as regards the authority of these Continental writers. A recent English case thus comments upon *Triquet v. Bath:* "The expressions used by Lord Mansfield * * * ought not to be construed so as to include as part of the law of England opinions of text-writers as to which there is no evidence that Great Britain has ever assented, and *a fortiori*, if they are contrary to the principles of her laws as expressed by her courts." [6] On the other hand, Chief Justice Marshall held distinctly in 1815 that the law of nations was a part of the law of the land, save, when, internally, a federal statute governed.[7] Long before that time state and federal courts had been deciding cases, not according to English precedent, but according to what the judges held specifically to be the law of nations.

It has been stated that "the first half of the eighteenth century was not a time of special growth or importance in the history of International Law." [8] If, however, it be remembered that this half-

[6] West Rand * * * Co. *v.* King, L. R. 1905, 2 K. B. 391; see this JOURNAL, 1:217.

[7] The Nereide, 9 Cranch, 388.

[8] Professor Woolsey in Two Centuries' Growth of American Law, 494.

century practically covers the period from Pufendorf to Vattel, it will be seen to have been a time of very great development in this field, for during it the law of nations came to be differentiated from the law of nature. The writers from Grotius to Vattel so molded the law of nations that they may be said to have changed it from a body of rules, which ought to govern states, to a body of rules actually governing them. The law drew upon practice for authority as time went on, and conversely, practice was influenced by their statements of the law. Pufendorf, who succeeded Grotius, made no distinction between the law of nature and the law of nations, between *jus naturæ* and *jus gentium*. Furthermore he denied that there was any binding voluntary or positive law of nations. This much eliminated from the science, Pufendorf called his contribution the "law of nature and of nations." In it the law of nature filled the vacuum caused by the omission of the positive law.[9] Vattel, influenced by Wolff, but by no means blindly following him, produced his work in 1758. Its title shows the change which had taken place since Pufendorf. The law of nations was with him "the principles of the law of nature *applied* to the conduct and affairs of nations and sovereigns." This book, says Professor Westlake, was the focus in which the schools of reason and of custom were first brought together, and from which the succeeding divergencies may be traced.[10]

At the time of the American Revolution the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers. Citations of Grotius, Pufendorf, and Vattel are scattered in about equal numbers in the writings of the time. Possibly after the Revolution Vattel is quoted more frequently than his predecessors. References were frequently made also to other writers who discussed the law of nature in its broader sense: to Burlamaqui, in his *Principles of Natural and Politic Law*, to Rutherforth, in his *Institutes of Natural Law* (founded upon Grotius). The law of nature played a part in the legal philosophy of the eighteenth century somewhat as did the doctrine of natural rights in the political thought of that era. Unfortunately the two were often confused. Still another

[9] Westlake, Chapters on the Principles of International Law, 65.
[10] Ibid., 38.

habit of thought led to confusion. The Newtonian conception of physical law was projected into the spheres of legal and political philosophy. The notion of " natural law " as the rule of the Creator, imposed upon the universe, was frequently tangled up with the current conceptions of the law of nature. Natural rights, natural law, and the law of nature, all had much influence over lawyers as well as statesmen in America, who made no clear distinctions among the three. When so orthodox a common-lawyer as Blackstone drew political doctrines from Locke and Montesquieu it is not surprising to find him imbibing legal philosophy from Grotius, Pufendorf, and Burlamaqui.

How great a vogue these and other writers upon the law of nature had among English-speaking people is evidenced by the number of English translations of their works. Grotius on *War and Peace* appeared in London in 1654, again in 1682, and in 1738. Pufendorf's *Law of Nature and of Nations* went through several editions in English: in 1710, 1716, 1729, with a fifth edition in 1749. Burlamaqui's *Principles of Natural and Politic Law*, which was published at Geneva in 1747, almost immediately appeared in English and before 1800 it had passed through seven editions. Blackstone's indebtedness to him for the earlier chapters of the Commentaries has frequently been noticed. A translation of Bynkershoek's work relating to captures was printed at London in 1759. A two-volume English edition of the *Elementa juris naturæ et gentium*, by Heineccius (1738), appeared with a London imprint in 1763. Wolff seems not to have appeared in an English dress, but Vattel, who represented at the time the greatest encroachment of the positive upon the natural law of nations, was soon translated into English. Written in 1758 an edition appeared in London before 1760. Several other editions followed until in 1833 the eminent legal name of Chitty gave it additional authority. It is evident, therefore, that there was no dearth of English versions of those Continental exponents of the law of nations to take the place of the English authorities the lack of which Lord Mansfield deplored in 1764. Just how soon copies of these works, either in the original or in translation, found their way to America is difficult to state. Among the books in the library of Colonel William

Byrd of Westover was Pufendorf in English and in Latin.[11] About 1770 Councillor Robert Carter of Virginia possessed Justinian, Grotius, and Pufendorf along with his Coke upon Littleton and Blackstone. Other instances might be cited to show that by the middle of the eighteenth century American lawyers, especially those trained at home and not at the Inns of Court, were more or less familiar with legal ideas somewhat alien to those whose studies had been confined to Littleton, Coke, the Abridgements, and the Reports. That law-students in the colonies should have turned to these writers upon the general principles of jurisprudence was not strange considering that law-libraries were small and infrequent, and that until after the Revolution there was no American text-writer or reporter. As the time of the Revolution drew near, and the doctrine of natural rights became more popular, law based upon universal principles was more attentively considered. As the contest with England progressed Americans turned from the argument based upon the legal rights of Englishmen to those founded upon the natural rights of man. With this change the somewhat popular notions of the law of nature were made use of. James Kent read Grotius and Pufendorf while pursuing his studies. Hamilton, Burr, and R. R. Livingston had the same master. Hamilton and probably the others were grounded in these authors. In February, 1775, Hamilton, then eighteen years of age, advised the "Westchester Farmer" to apply himself without delay to the study of the law of nature: "I would recommend to your perusal Grotius, Pufendorf, Locke, Montesquieu, and Burlemaqui. I might recommend other excellent writers on this subject; but if you attend diligently to these, you will not require any others."[12] In John Adams's Novanglus of 1774 we find Grotius, Pufendorf, and Barbeyrac quoted along with his favorites, Locke and Harrington. Columbia, then King's College, established a professorship of natural law in 1773. At William and Mary College about 1780 there were chairs of natural and politic law as well as of "law and police." Vattel and Burlamaqui were used as textbooks there as well as at Dartmouth, where the latter was used in the classroom from

[11] The Writings of Colonel Wm. Byrd, page 417.

[12] "The Farmer Refuted," Hamilton's Hamilton, II, 42.

1796 to 1828. The demand for Burlamaqui's Principles was so great that editions of it were printed at Boston in 1793 and at Cambridge, Massachusetts, in 1807.[13] In December, 1775, Franklin acknowledged the receipt from Dumas of three copies of the latter's edition Vattel. The book, wrote Franklin, "came to us in good season, when the circumstances of a rising State made it necessary frequently to consult the law of nations. * * * (It) has been continually in hands of the members of our Congress now sitting."[14] An American edition appeared from a press in Northampton, Massachusetts in 1805. De Martens's "Summary of the Law of Nations" had already appeared at Philadelphia in 1795 in a translation published by William Cobbett and dedicated to Washington. As a further evidence of the demand for the Continental writers may be mentioned the translation of a part of Bynkershoek published at the same place in 1808. Hoffman, in his "Course of Legal Study" (Baltimore, 1817), recommends as a general introduction to the law, *inter alia,* Burlamaqui, Rutherforth, Grotius, and Pufendorf. Burlamaqui he esteemed as "pleasing and useful," Rutherforth as "of inestimable value," while "no legal student, ambitious of deep and solid learning would be willing to acknowledge an unacquaintance with the treatises of Grotius and Pufendorf."

While most of the Revolutionary leaders were conversant with political philosophy few were legal philosophers. A notable exception was James Wilson, esteemed as the most learned lawyer of his generation. In his lectures on jurisprudence, delivered in 1790, one may follow the first American presentation of the principles of the law of nature and of nations. In them Wilson criticises Pufendorf's definition of law as the command of a superior which the inferior was bound to obey. Putting himself squarely upon the principle of popular sovereignty, Wilson urged that the validity of all law is derived from the consent of the governed. He condemns Grotius, Heinec-

[13] Judge S. E. Baldwin in his American Judiciary, pp. 348 sqq., gives other facts relating to early American legal education, as does Professor James F. Colby in his article "The Collegiate Study of Law," Report of American Bar Ass'n, 1896.

[14] Wharton's Diplomatic Correspondence of the American Revolution, II, 64.

cius, Wolff, and Domat, for denying that sovereignty is always in the people. Such a doctrine at which no civilian would have cavilled was to Wilson the admission of passive obedience. "The position that law is inseparably attached to superior power was the political weapon used with the greatest force and skill in favor of the despotic claims of Great Britain over the American colonies." [15] Burlamaqui's position, that "virtual" sovereignty *may* reside in the people he dismisses as inadequate. Wilson would have the people actually and legally as well as virtually sovereign. The commanding sovereign is thus disposed of, but only in the case of municipal law. The law of nations is far different. Wilson in general follows Hooker's division of the law (derived from Thomas Aquinas), — those laws with God as author being the law celestial, or eternal, or physical, or made for man. If the laws made by God for man are communicated through reason and conscience they comprise the law of nature. If addressed to political societies they form the necessary or internal law of nations following Grotius, or, rather the law of nature as applied to nations, to use Vattel's phrase. But laws may be made by man. When so made they rest upon the same authority, namely, God. Such are municipal laws: those which political societies make for themselves. To these Wilson adds another class: those laws which two or more political societies make for themselves. In other words, following Vattel, he admits the voluntary or conventional law of nations. In all these classes the commanding authority is God. The obeying subjects are individuals or nations. No other source of authority is admitted. A human source leads to passive obedience and to tyranny. Following Barbeyrac and Barlamaqui he resolves "the supreme right of prescribing laws for our conduct and our indispensable duty of obeying those laws, into the omnipotence of the Deity, infinitely good, wise, and powerful." [16] Hence the law of nature, whether applied to individuals or to states, is "immutable and universal," "God being under the glorious necessity of not contradicting himself." This statement follows the doctrines of the Continental writers, but Wilson adds that the law of nature alone has a command-

[15] Works, I, 174.
[16] Ibid., I, 98.

ing sovereign, all other laws have validity only through consent: through the consent of the sum of the people as municipal law (*vox populi, vox dei*); through the consent of states, if the voluntary law of nations. But the voluntary law of nations is always under the control of the law of nature, just as municipal laws are. While Wilson admits Pufendorf's contention that the obligation of the law of nature is the same in both cases, always universal, indispensable, and unchangeable, he shows the influence of Vattel (after Wolff) in admitting that the application of the law of nature to nations is really at times to be determined by the practices of nations. His conclusion is that "the law of nations is the law of nature *judiciously* applied to the conduct of states." Like Pufendorf, Burlamaqui, and Vattel, he stresses the internal obligations of states according to the law of nature. Externally, or as to other states, a nation should do no wrong, but always good, and to this end nations "should love one another." Such being the sum of the law of nature, given, like Hillel, while standing upon one foot, he finds the principles of the voluntary law practically comprised in the observing of treaty-faith. This counsel of perfection can hardly be called international law and is perhaps only a "rhetorical appeal."[17] As the first attempt by an American, however, to give expression to the Continental law of nature it is perhaps not without historical value. It serves to show how far this able jurist went afield when once outside the well-beaten path of legal principle and precedent.

Such being the substance of the first American academic or philosophical presentation of the law of nations, we may turn to the earliest judicial consideration of the subject in order to determine how much the law of nature was applied in concrete cases. It is to be borne in mind in this connection that England was at the head of those European states which wished no concessions or reforms in the law of nations. The Continental writers holding to the law of nature discussed the law of nations as it ought to be. With this position British statesmen and judges with but few exceptions had little patience. Naturally the colonies, having become independent, took

[17] Cf. Holland, Jurisprudence, 10th ed., 10.

an attitude the opposite of England's. Americans tended to range themselves upon the side deemed to be "liberal." By so doing they satisfied their own philosophical predilections and won some favorable response from the continent of Europe.

The attention of Americans was first drawn to the law of nations through the question of prize. In November, 1775, Massachusetts passed an act regulating marque and reprisal and established a prize court. During the year following the supreme court of Massachusetts decided that by March 7, 1776, Boston was a place besieged according to the law of nations, and upon that ground decided questions arising out of the seizure of vessels captured while carrying supplies to the British troops in Boston.[18] Soon after the Massachusetts act was passed Washington pointed out to the Continental Congress the necessity of establishing proper courts for the decision of captures. The Congress thereupon legalized former captures and provided for future cases, recommending to the legislatures of the several colonies that they follow the example of Massachusetts. As the supreme body having control of war and peace, the Congress stipulated that appeals should be had to it. The various colonies acted upon this recommendation and in several of them prize cases were being tried even before independence was declared. The inability of the Congress to enforce its decrees upon appeal was one of the conspicuous failures of the Confederation. It is not the purpose of this paper to consider the many conflicts of authority between states and the Continental Congress upon procedure and appeals. In its appellate capacity "sixty-four cases were submitted to the committees of Congress, of which forty-nine were decided by them, four seem to have disappeared and eleven went over to the Court of Appeals" (created in 1780) for decision. "Fifty-six cases in all, including the eleven which went over, were submitted to the Court of Appeals and all were disposed of. Appeals were heard from every state except New York."[19] As to how many cases were tried in the state courts and there disposed of without appeal there is no record. But few of them were reported.

Of the fifty or more cases decided in the Federal Court of Appeals,

[18] Glover *v.* The Brig William, 7 Dane's Abr., chap. 227, sec. 12.

[19] Article by J. C. Bancroft Davis, appendix to 131 U. S., xxxiv.

1 Dallas contains reports of eight. These prize-cases and the case of *Res-publica v. Longchamps,* also in 1 Dallas (Ill.), decided by the Pennsylvania court in 1784, are believed to be the first reported statements of the position which the law of nations had in American law. In the *Longchamps case* James Wilson assisted in the prosecution and cited the case of *Triquet v. Bath* as well as Vattel (book 1, sec. 6, and book 4, secs. 80–84) in urging the necessity "of sustaining the law of nations" and of showing the connection "between the law of nations and the municipal law." Judge McKean, who had been trained at the Inns of Court, held an indictment good, in which the defendant was charged with an assault upon a member of the diplomatic corps (Barbé-Marbois), as constituting an offense against the law of nations. The opinion stated that "the law in its full extent is part of the law of this State (Pennsylvania), and is to be collected from the practice of different nations, and the authority of writers."[20] Not much different it would seem, were the decisions of the courts in the prize-cases. In each case reported the court took the position that the question of prize or no-prize was to be decided wholly by the law of nations. In the case of *Talbot v. The Commanders of Three Brigs* (1 Dallas, 95), decided by the Pennsylvania high court of errors and appeals in 1784, President Dickinson refused to recognize the British distinction between instance and prize courts and proceeded to assume the fullest jurisdiction for his court. He denied that such a distinction prevailed elsewhere than in England. "Whatever in the law of nations relates to a court of admiralty, relates to this court, because no treaty has diverted its application. There was a time when we listened to the language of her Senates and courts, with a partiality of veneration, as to oracles. It is past — we have assumed our station among the powers of the earth, and

[20] In connection with the Longchamps case, it may be remarked that Pennsylvania went farther during the Confederation than any other state in giving consideration to foreign relations. Both the Supreme Executive Council and the Assembly paid much attention to the Longchamps case, and the former held several conferences with the French minister upon the subject. See the Minutes of the Supreme Executive Council of Pennsylvania, volume 14, pp. 115, 117, 121, 593. In 1782 the General Assembly passed an act "to secure the rights of Frenchmen according to the Treaty of 1778." Pennsylvania Statutes at Large, X, 509.

must attend to the voice of nations — the sentiments of the society into which we have entered." This view of Dickinson was not peculiar to him. Each decision followed the principle that the question of prize was determinable wholly by the law of nations. The federal court of appeals in the cases of the Revolution (1781, 2 Dallas, 1, 4) stated that the municipal laws of a country could not change the law of nations, so as to bind the subjects of another country. The court further held that the ordinance of Congress, passed April 7, 1781, adopting the French twenty-four-hour rule as to recapture, related only to subjects of the United States. As to neutrals, the question of prize was to be decided by the law of nations.

It is impossible within the space of this paper to consider more in detail these prize cases. From them, however, certain generalizations seem to be warranted: (1) that the state courts, as well as the federal court of appeal, assumed full jurisdiction; (2) that the English theory, rules, and precedents were not slavishly followed; (3) that the question of prize was held to be determined by the law of nations; (4) that the law of nations so adopted was largely that administered by the Continental courts of admiralty; (5) that there are fewer references to the Continental text-writers, identified with the law of nature, than the popularity of these writers in America might lead one to expect; and (6) that there was a persistent effort on the part of the Continental Congress to have the federal power the final judge of all matters involving questions of international law. The state courts continued to assert their jurisdiction as to prizes. This was resisted by Congress which declared, March 6, 1779, in aid of its right to determine such cases, that Congress "is by these United States invested with the supreme sovereign power of war and peace. That the power of executing the Law of Nations is essential to the sovereign supreme power of war and peace; that the legality of all captures on the high seas must be determined by the Law of Nations, and that the authority ultimately and finally to decide in all matters touching the Law of Nations does reside and is vested in the supreme power of war and peace." [21] This right was, of course, vindicated only by the adoption of the federal Constitution.

[21] Journals of Congress, V, 86–90.

As the decisions of the courts prior to 1789 reveal an independent interpretation of the law of nations, avoiding the extremes of British precedent and of Continental theory, the other channel by which international law found its way into the United States remains to be considered, namely through diplomacy. It must be confessed that the determination of the amount of influence played by the law of nature upon the beginnings of American diplomacy is difficult. Much of the evidence is naturally of a negative character. Almost coincidently with the declaration of independence Congress appointed a committee to draft a treaty to be proposed to France. The report of this committee, probably shaped by John Adams, was afterwards revised by James Wilson, who also had a hand in framing the instructions to accompany the proposed treaty. The French treaty of commerce of 1778 follows to a remarkable degree that draft prepared by the committee in the summer of 1776. Many articles of the draft were incorporated in the treaty without change either of idea or of phrase. In the draft are contained many of the principles upon which later commercial treaties were prepared. In one instance at least (the provision of the draft that import dues should be laid uniformly upon the subjects of both treaty-powers) the draft went beyond the prevailing commercial practices of European nations. For the rest the provisions of the draft are in harmony with the most liberal European usage. How far Continental practice relative to the matters contained in the draft had been modified by the text-writers cannot be considered here. The draft appears to have been prepared with the idea that the United States would adopt these usages, having always a due regard for its own commercial welfare. In no sense does the draft appear to have been prepared wholly upon the theory that the treaty should be declaratory of the law of nature. Sometimes the provisions of the draft run behind and sometimes ahead of the doctrines of Vattel, then the most recent writer upon the subject. Thus upon the question of contraband, wholly a matter of practice and of treaty-stipulation, and not of the law of nature, the draft confines forbidden property strictly to arms and munitions of war. following the provisions of the Russo-British treaty of 1766.[22]

[22] Wheaton's History of the Law of Nations, 298, n.

Vattel's list is larger, including naval stores and even provisions.[23] That the draft narrowed the list of contraband may be ascribed to the desire of Adams and his colleagues to provide for a legitimate neutral trade for the United States in case France might be engaged in war on her own account.

Upon the right of visitation in order to ascertain the presence of contraband, the draft makes more liberal provision than Vattel, who held that a vessel refusing to be searched could from that proceeding alone be condemned as lawful prize. The draft permitted visitation only, with an inspection of the ship's papers. This stipulation for the giving of full credit to ship's papers had been recognized by Bynkershoek and Vattel as in harmony with the best-established usage.

As regards neutral duties and rights, we come nearer to the law of nature. It is true that Wolff held that neutrality was an abnormal condition for a state, but Wolff held more to the law as based upon practice. Vattel's development of the idea of neutrality was based upon the law of nature: that by the law of nature nations are in a state of peace and have a right to remain so. The great development to which American diplomacy gave to the doctrine of neutrality in 1793 (which Genet connected with the "aphorisms of Vattel"[24]), had its origin at the very beginning of American independence. Its foundations were laid by those Continental text-writers who held that by the law of nature the natural state of nations was peace and not war; that peace was the normal and war the abnormal condition.[25] Vattel in using this axiom develops the idea so far as to lay down the rule that neutrality includes not only the right to abstain from war, but the duty to observe "a strict impartiality toward the belligerent powers." With this doctrine the committee must have been familiar. Later as developed under Washington it became the basis for America's great contribution to the law of nations and indeed, for the vindication of her independence.[26]

[23] Vattel, Book III, sec. 113.

[24] Jefferson to Gouverneur Morris, Aug. 16, 1793, Am. State Papers, For. Rel. I, 168.

[25] Cf. Lorimer, II, 52.

[26] Hall's International Law, 4th ed., 615.

The correspondence over the treaty of peace with England yields negative results as to the law of nature. Upon two subjects of long and careful discussion, the fisheries and the navigation of the Mississippi, the American commissioners argued to some extent from the law of nature. This, however, is not so much the law of nature as found in the texts as natural law in the sense of physical configuration.[27] The instructions of Congress of August 14, 1779, insisted upon the free and undisturbed exercise of the common right of Americans to fish on the Newfoundland banks. In other words, the claim was based upon long usage and not upon the law of nature. The right to navigate the Mississippi was claimed by the "law of nature," it is true, but Franklin's famous remark seems to point to physical conditions.[28] While Adams mentions the law of nature as giving the right to free navigation of the Mississippi, he is careful to add that it was ours because of the charters and as a consequence of the Revolution.[29] The characters and temperaments of the negotiators, British and American, were not such as to resort to many arguments beyond expediency and opportunism. Each side was after the best settlement possible and little effort was expended in what would have seemed more or less abstract and academic.

Notwithstanding the predilection of American for philosophical generalization, the confusion between the law of nature and natural rights, and the familiarity which the early American jurists had with the Continental writers, the positive impress of the law of nature upon the American ideas of the law of nations seems upon the whole not to have been great. Specific instances of the incorporation of the law of nature into the law of nations, as interpreted by Americans, are few. For this apparently negative result certain causes may be mentioned: (1) the spirit of the law of nature, the *jus naturæ*, was really alien to lawyers whose thought lay within the common law;

[27] John Adams's Journal, November 25, 1782; Wharton's Diplomatic Correspondence of the American Revolution, VI, 72.

[28] "Poor as we are, yet as I know we shall be rich. I would rather agree with [Spain] to buy at a great price the whole of their right than sell a drop of its waters. A neighbor might as well ask me to sell my street door." Franklin to Jay, October 2, 1780. Ibid., IV, 75.

[29] Ibid., VI, 31.

(2) the notion of sovereignty developed by the Continental writers was drawn from the Roman law, and was opposed to that of popular sovereignty; (3) the law of nations early crept into American courts in connection with questions of prize, a subject to be dealt with according to international practice; (4) Vattel was the last of the great text-writers upon the law of nations drawn from the law of nature. After Vattel Kant transformed the law of nature into a new *Naturrecht*. By this later influence American jurists were untouched. On the other hand, the influence of Bentham in the course of little more than a generation materially changed the theory of the law both in England and in America; (5) the adoption of the Federal constitution gave an opportunity for the uniform development of international law as applied to concrete cases. After 1789 there was a growing body of law upon which American diplomats grew more and more dependent. The spirit of the common law, which exalts the case and neglects the text-writer, has always dominated our courts. With the establishment of the Federal supreme court began, case by case, an authoritative and fairly uniform exposition of international law. The growing body of American precedent rendered references to the Continental writers less necessary.

At the outset, when Americans came for the first time into contact with international questions, when they had no precedents of their own, familiarity with Continental writers was of great importance. The principles of the law of nature provided a basis of authority for departing from the rules of British usage. The doctrine of natural rights furnished a political ideal for individuals. The principles of the law of nature assisted in giving to the founders of the Republic an idealistic conception of its rights as a nation and of its duties toward other states.

JESSE S. REEVES.

THE PRACTICE OF ASYLUM IN LEGATIONS AND CONSULATES OF THE UNITED STATES[1]

The practice of extending protection, or "asylum," within the walls of legations and consulates to refugees and unfortunates, rests upon no very satisfactory legal basis, but rather upon considerations of humanity. Though from time to time certain recognized doctrines of international law and certain doctrines of somewhat more doubtful recognition have been asserted in justification, it will be found that the so-called "right of asylum" is no right at all, but only a privilege granted or claimed where its use seems necessary by reason of an unstable condition of society.

In those countries in which the government is stable and enduring and the local law dominant, the privilege is seldom called in question, but has fallen into "innocuous desuetude," simply because there has been no necessity for its exercise, until to-day it is doubtful if in one of the greater nations of the world its existence would be either claimed or conceded. However, in those states comprehended under the term "Spanish-American countries," the conditions favoring its use have so frequently occurred that it has continually been the subject of diplomatic correspondence. There has seemed something inherent in the Spanish character demanding the interposition of a neutral restraining hand at certain recurrent crises in the political lives of those countries. Thus it is that almost every instance of the attempted exercise of the privilege by an American minister has occurred in one of the so-called republics of Central and South America.[2] Accounts of at least forty-three instances[3] upon the West-

[1] The writer has previously published portions of this article in the *Harvard Law Review*. These are reprinted by the courtesy of that publication.

[2] The discussion is confined to cases arising in Central and South American countries. There are but few other instances in our diplomatic reports.

[3] (1) 1851, Chili. (2) 1853, Peru. (3) 1854, Peru. (4) 1855, Nicaragua. (5) 1859, Chili. (6) 1865, Hayti. (7) 1865, Peru. (8) 1867, Peru. (9) 1868, Paraguay. (10) 1868, Hayti. (11) 1869, Hayti. (12) 1870, Guatemala. (13)

ern Hemisphere wherein the question of asylum has been opened appear in our Foreign Relations Reports: 17 in Hayti, 5 in Bolivia, 4 each in Chili and Peru, 3 in Ecuador, 2 each in Guatemala, Nicaragua, and Paraguay, and 1 each in Colombia, Mexico, Salvador, and Santo Domingo. the earliest of these cases being that in Chili in 1851, and latest in Hayti in 1905.[4] Of all these, the more important instances have been that involving the romantic and spectacular career of General Boisrond Canal, in Hayti, in 1875, wherein the use of asylum was deprecated and disavowed as far as seemed consistent with the dignity of our flag, and that extended use to which the privilege was put by Minister Egan, in Chili, in 1891, in which, so far as may be gleaned from official correspondence, the position of our representative was supported by his government.

It may be most profitable to take up these matters in chronological order, to see if our government has throughout maintained a consistent attitude, and afterwards to discuss the foundations of the various claims and the principles involved.

HISTORICAL SUMMARY

Prior to the date with which this summary begins, several detached instances of the exercise of the right of asylum in Central and South America are to be found, and, in the instructions of Mr. Livingston, Mr. Calhoun, Mr. Buchanan, and Mr. Clayton, secretaries of state, the general tenor prevails that the privileges are "more liberally construed in the Mohammedan states and in South America than in the leading European states, but they should be in all cases

1871, Salvador. (14) 1872, Hayti. (15) 1873, Hayti. (16) 1875, Bolivia, Jan. 19. (17) 1875, Bolivia, Feb. 20. (18) 1875, Bolivia, March 20. (19) 1875, Hayti, May 1. (20) 1875, Bolivia, Oct. 5. (21) 1877, Mexico. (22) 1878, Hayti. (23) 1879, Hayti. (24) 1885, Colombia, Feb. 23. (25) 1885, Hayti, Nov. 7. (26) 1888, Hayti. (27) 1890, Hayti. (28) 1890, Guatemala. (29) 1891, Chili. (30) 1892, Hayti. (31) 1893, Nicaragua. (32) 1893, Chili, April 10. (33) 1895, Ecuador. (34) 1896, Hayti, Feb. 3. (35) 1896, Ecuador, March 12. (36) 1898, Bolivia. (37) 1899, Ecuador. (38) 1899, Hayti, Aug. 2. (39) 1899, Hayti, July 17. (40) 1899, Hayti, Aug. 14. (41) 1904, Santo Domingo, Feb. 1. (42) 1904, Paraguay, Aug. 11. (43) 1905, Hayti.

[4] At the time of the writing of this article the last two current volumes of the Foreign Relations Reports are not yet made public.

guarded." Mr. Calhoun once states, "They must be indulgently construed."

1. In 1851, Mr. Webster took a position considerably different from that of his predecessors, stating that although acquiescence by the government of Chili on former occasions might preclude that government from objecting to the continued granting of such hospitality, yet, "if it makes objection * * * our minister should advise the particular political refugees that shelter can no longer be afforded." 2. In 1853, Mr. Marcy, secretary of state, denied the right of consuls to "afford protection to those who have rendered themselves obnoxious to the authority of the government under which they dwell." And he refused to see any insult to our flag in the arrest of the refugees within the consulate. "The flag had been unwarrantably used." (Peru.) 3. In 1854, on a demand that all refugees should leave the republic, our minister to Peru insisted that foreign legations were "entirely exterritorial," and that the right in question had been officially recognized and constantly respected by all the governments, since the independence of Peru, within its borders. 4. In 1855, Mr. Marcy repeated his instructions of 1853 almost verbatim in a case arising in an American consulate in Nicaragua. 5. In 1859, the United States consul in Valparaiso, Chili, undertook to protect certain political refugees. His house was attacked by soldiers, the refugees taken, and his "exequatur" recalled. Secretary Cass instructed our minister resident, "The existence of a usage of asylum such as you mention would go far to induce this government to require the restoration of Mr. Trevitt's exequatur." It seems, however, that the exequatur was not restored. The violence of the entrance effected seems to have been uppermost in Mr. Cass's mind. 6. In 1865, our minister to Hayti was instructed that consuls have no right to harbor political refugees, and there could be no cause of complaint if refugees so harbored were to be taken from the consular abode. 7. In 1865, in Peru, occurred one of the most notable cases. In May, General Canseco took refuge in the American legation, where our minister refused to surrender him, a position taken in common with the other ministers resident. He soon after escaped, and was instrumental in the overthrow of the existing government when mem-

bers of the defeated party in turn sought refuge. Mr. Hovey, a new minister, had by this time (December 20) succeeded Mr. Robinson, and refused to grant asylum, stating in contradiction to the French minister, who said: "Its benefits amply compensate for a fault inspired by the sentiment of humanity," that "The houses of foreign ministers have become little less than the abode of criminals who flee from the vengeance of the law. * * * The practice leads to very evil consequences." His position was expressly sanctioned at Washington. 8. In 1867, in a conference of the various ministers to Peru, Mr. Hovey endeavored to have Peru recognized as a "Christian nation," "the law of nations as relating to the question of asylum to be the same as practiced in the United States, and the Christian nations of Europe." He was strenuous in his endeavor to abolish the right, but the other ministers were united against him. But the Peruvian government finally declared that it "renounced its right of her legations in other South American states to the said privileges, and denies the same to the legations of such states in Peru." This seems to have effectually cleared the atmosphere in this country, for there is no subsequent record of Peru upon the books of the United States.

9. In 1868, Washburn, minister to Paraguay, gave shelter to a number of political refugees, including two American citizens. A list of them having been furnished to the government, they were demanded, and the Americans seized as they were accompanying Mr. Washburn out of the country. They were subsequently released upon demand of Admiral Davis, backed up by an American man-of-war. No complaint was made by Secretary Seward as to the refusal of the Paraguayan government to permit the continuance of the practice, but in his note of January 14th he said: "Your intention to afford asylum in the legation to those who may resort to it, save notorious criminals, as far as it can be done without compromising your neutral character, is approved." 10. At about the same time, May, 1868, Mr. Seward was instructing Mr. Hollister, minister to Hayti: "We are prepared to accept your opinion that it is no longer expedient to practice the right of asylum in the Haytien republic. Nevertheless, we should not be willing to relinquish the right abruptly

* * * nor any sooner, nor in any greater degree, than it is renounced by the legations of the other important neutral powers * * * the exercise of the right should be attended with delicacy and no display of arrogance." 11. In the following year, Mr. Secretary Fish, who gave our policy a strong impetus in its present direction, began to take a more radical position. He says to Mr. Bassett at Hayti: "While you are not required to expel * * * you will give them to understand that your government cannot assume any responsibility for them, and especially cannot sanction any resistance by you to their arrest by the authorities for the time being." 12. In 1870, Mr. Hudson, minister to Guatamela, refused to give refuge to one Granadas, at that time eluding arrest for rebellion, but upon the overthrow of the government and the rise of Granadas, he extended the protection of the legation to all parties; whereupon the United States government gave answer: "Your efforts to protect life and property meet with the approval of this department." 13. In 1871, Duenas, the deposed president of Salvador, took refuge at the American legation, whence he was later surrendered upon the guarantee that his life would be spared, and with his own assent. Mr. Fish regarded the assent as a necessary element in the case, apparently thus claiming the right to retain the refugee. He subsequently called upon the government to respect its promise of immunity. 14. In 1872, American consuls in Hayti protected refugees without comment from the government, under a "wise discretion and avoidance of misunderstandings." 15. In 1873, Mr. Fish regarded the invasion of the consular office at St. Marc an international discourtesy requiring an emphatic protest and a demand for decided redress, but did not make any claim on account of the fugitives arrested.

The year 1875 was prolific of trouble for our ministers in Bolivia and Hayti, in both of which countries mushroom revolutions and counter-revolutions sprung up. In Bolivia four different instances arose (cases 16, 17, 18, 20), while in Hayti our legation was in a state of siege from May 1 to October 5 over the case of General Boisrond Canal, the "pièce de resistance," under this head, of American diplomacy. 16. Minister Reynolds, at La Paz, on January 19, congratulated himself that "no harm has come to any one that asked

asylum in this legation." 17. On February 20, he refused asylum to those " connected with the late mutiny, knowing well its character, wherein many murders were permitted in cold blood," but allowed two political refugees to remain who filed statements that they had not been in arms. He also assured the Bolivian government that " under no circumstances could I permit an unfriendly or hostile act toward the constitutional government of Bolivia by any one under the protection of the flag." 18. Upon March 20, he refused asylum to further insurgents on the ground that " they were criminals to be tried for incendiarism and murder in the attack upon the imperial palace," while, October 5 (case 20), he refused General Suarez, who claimed to be a political refugee, not " knowing for what he was sought to be arrested or charged," and this position was approved at Washington.

19. In Hayti, May 1st, there was a scene of wild disorder. Illegal arrests had been ordered for three leaders of the opposition party; they, fearing that the arrests were made as cover for assassination, resisted. Two were killed, but General Boisrond Canal fought his way with two relatives to the country house of Minister Bassett, where were three other Haytien gentlemen spending Sunday with the minister. All of the refugees in the legation were demanded, martial law was proclaimed, the whole town was in an uproar, 1,500 soldiers were posted around the premises, and threats of incendiarism were made. The minister refused to give a list of the fugitives, asserting that this was a courtesy given in the past only to expedite the embarkation of refugees, and not to furnish ready identification for a trumped-up indictment. The Haytien government insisted that the refugees were guilty of criminal acts, while Minister Bassett was equally positive (and in this opinion the diplomatic corps agreed) that the fugitives were only political offenders, and the arrest was intended as a *coup d'état*. Ingress and egress at the minister's home was blocked, and the continued noise made by the armed forces rendered rest impossible. While Mr. Bassett protested against this outrageous treatment, the Haytien government took an appeal through their minister at Washington to Secretary Fish, and upon September 27th, after a statement by Secretary Fish that the continuance of the

indignities would be considered an unfriendly act justifying the visit of a warship, it was agreed that the refugees should be embarked for Jamaica upon surrender to the Haytien officials. During the course of correspondence the following extracts are of importance:

I shall receive and protect, as I judge best, in my legation, any and every person who may apply. (Stuart, British Minister.)

I do not see how we can ignore it in the face of the practice which has existed here for seventy years. The right of asylum has never been renounced by this government, and it practically has refused to assent to its discontinuance. * * * The Haytien plenipotentiary would not agree to having the exercise of this right taken away from even our consulates in the inferior ports. (Minister Bassett to Secretary Fish.)

These men are considered as being on the territory of the United States and under its protection. I guarantee that they will in no way affect public order while they remain here. (Minister Bassett to Mr. Excellent of Hayti.)

Since the custom is tolerated by the other powers * * * we are not disposed to place the representatives of the United States in an invidious position by postively forbidding them to continue the practice. * * * You have repeatedly been instructed that such a practice has no basis in public law, and is believed to be contrary to sound policy. The course of other states in receiving political refugees is not sufficient to sanction a similar step for us. * * * However, it is not expedient that the refugees should be given up. * * * No matter what our disposition to receive reasons to palliate or justify, it is still in the power of the Haytien government to refuse to be satisfied. * * * It is to be regretted that you allowed your partialities and humanity to overcome that discretion which you were expected to exercise. (Secretary Fish to Minister Bassett.)

The practice has been to tolerate the right in countries of Spanish origin * * * the practice has never addressed itself to the full favor of the government. * * * This government is not by itself and independently disposed to absolutely prohibit its diplomatic representatives from granting asylum in every case. They may exercise the prerogative under their own responsibility. * * * We would prefer, therefore, not to formally assent to the "propositions you make for its abolishment" without ascertaining the views of other governments. (Secretary Fish to Mr. Preston [Hayti].)

21. In 1877, General Arce took refuge in an American consulate in Mazatlan, Mexico. Notwithstanding the fact that our consul announced that he was under his protection, the refugee was forcibly removed. Minister Foster called attention to our discouragement of asylum, but claimed that the act was in bad faith after the assurance

by the Mexican government of its respect of the protection. The matter does not further appear in the reports. 22. In 1878, Minister Langston, after giving the names of certain refugees rebelling against the Canal administration, secured their embarkation with the consent of the Haytien government. The diplomatic corps had agreed not to deliver up any one desiring refuge. 23. In the following year, in the revolution of that season, Boisrond Canal, who subsequently to his asylum in 1875, had returned and had been chosen President, abdicated and claimed again the right of asylum, this time upon a British war vessel. At this time Secretary Evarts thus instructed Langston:

> If the so called right of asylum (which this Government has never been tenacious in claiming for its officers abroad) is to continue to exist as a quasi rule of public law in communities where the conspirators of today may be the government of tomorrow, it should at least be so exercised as to afford no ground of complaint on the score of aiding and comforting rebellion by conniving at communication between the refugees in asylum, and their associates who are, it may be, engaged in hostilities against the existing government. It is evident that asylum would be intolerable, as well as reprehensible, were not the refugees supposed to be kept out of mischief as well as out of danger. The practice has become so deeply established as to be practically recognized by whatever government may be in power, even to respecting the premises of a consulate, as well as a legation. This government does not sanction the usage, and enjoins * * * the avoidance of all pretexts for its exercise; while indisposed from obvious motives of common humanity to direct its agents to deny temporary shelter to any unfortunate threatened with mob violence, it will not countenance any attempt to knowingly harbor offenders against the laws.

24. February 23, 1885, a controversy arose with the Colombian government over the protection afforded a wealthy citizen in the Argentine legation, and Minister Scruggs delivered himself of the following: "To make the exemption of the minister the more complete, the fiction of 'exterritoriality' has been invented, whereby, though actually in a foreign country, he is supposed to remain within the territory of his own sovereign." This view was straightway disavowed by Secretary Bayard, who stated that the argument deduced from this phrase as a basis was utterly fallacious.

25. On October 17, 1885, Mr. Thompson reported from Haiti that a man who had been active in the then "late revolution," had been

secreted on a French bark; that the authorities had sought permission of the French minister to go aboard the vessel, but after his refusal, had permitted the vessel and the man to depart. Mr. Thompson asked for instructions as to what to do in a similar case, should one arise in connection with an American vessel. Mr. Bayard replied:

> International Law does not recognize the right of asylum of foreign legations in any country and according to American principles of law a merchant vessel in port is under the authority of the local laws and neither a consulate or a legation would have anything to say in regard to a supposed criminal being taken from a ship.

Mr. Bayard afterwards said (November 7),

> If, as a custom, the practice prevails, the exercise by Americans could not be deemed exceptional, and we should certainly expect such privileges as would be accorded other powers. But we *claim* no right or privilege of asylum, but discountenance it.

26. On October 31, 1888, the following instruction was given to Mr. Goutier, consul at Cape Haitien, for whose information it had been substantially given in 1885, he having stated that American consulates did not recognize the privilege of asylum.

> We do not regard extra-territorial asylum either in a legation or in a consulate as a right to be claimed under International Law. We do not sanction or invite the exercise of asylum in those countries where it actually exists as a usage; but in such cases we recognize and admit its existence, and should circumstances bring about the uninvited resort of a political refugee for shelter to a consulate or legation of the United States, we should expect equal toleration and privilege in this regard with that allowed by such local usage to any other consulate or nation.

27. The same instructions were repeated to Mr. Douglass in 1890, when the ubiquitous and pyrotechnic General Boisrond Canal, in the shift of fortunes, was again a compulsory guest, this time at the British legation, other persons having sought our shelter.

28. In 1890, our minister to Guatamela, Mr. Mizner, permitted the authorities of that country to board the American vessel "Acapulco" for the purpose of capturing a political refugee, General Barrundia, who was killed in the encounter that followed. Mr. Blaine took a position very different from that of his predecessors and one that has been itself severely criticized. The following are excerpts from his correspondence:

The most extreme writers hold it part of every nation's independence to grant asylum for those sought to be prosecuted for their political acts. No nation could acquiesce in the sudden disregard or heed a demand for the peremptory abandonment of a privilege sanctioned by so general a usage.

Even more powerfully do these causes operate to secure a refuge on foreign vessels.

In respect to political offenders a very important and considerable exception has in practice been made in Spanish-American countries to the general rule as to the exercise of jurisdiction over foreign vessels. The same exception is also found to exist there in the case of asylum in foreign legations. It is a general principle that an ambassador or other public minister is not permitted to grant asylum to offenders in the country in which his legation is established. But an exception to the rule has been made in respect to political offenders and nowhere has it more generally prevailed than in Spain and in the countries of Spanish America. It is proper to say that the Government of the United States has never encouraged an extension of this exception for the reason that it is likely to lead to abuse. But at the same time it has on grounds of humanity frequently found itself obliged to maintain it. That it has done so with regret is due not more to its indisposition to exercise exceptional privileges than to the deplorable fact of the recurrent disorders which have so often caused those in power suddenly to seek a place of refuge from the hot and instinctive pursuit of others who have been able violently to drive them from their positions. It is to this unfortunate and unsettled political condition that the extension of political asylum to political offenders is attributable, and it is believed that the consideration of self interest arising from a sense of insecurity has not infrequently permitted the exercise of the privilege to pass without strenuous objection. Under these circumstances especially, no nation could acquiesce in the sudden disregard or heed a demand for the peremptory abandonment of a privilege sanctioned by so general a usage. The causes that have operated to foster the maintenance of an asylum for political offenders in legations have contributed perhaps even more powerfully to secure a place of refuge for them on foreign vessels. * * * For your course therefore in intervening to permit the authorities of Guatemala to accomplish their desire to capture General Barrundia, I can discover no jurisdiction. You were promptly informed that your act was regretted. I am now directed by the President to inform you that it is disavowed. The President is moreover of opinion that your usefulness in Central America is at an end.

It is interesting to compare this language with that of Secretary Bayard in case 25. Questions as to the right of asylum upon American ships also arose in 1891 in Salvador, 1892 in Venezuela, and in

numerous other instances, but the principals involved are apart from the present subject.

29. On the 29th of August, 1891, upon the defeat of the government forces in Chili, Minister Egan threw open the doors of the American legation to some eighty refugees, among them the family of the defeated president, Balmaceda. Nine days previously he had sheltered some of the revolutionists against the opposition of the then government, which threatened to search the legation to discover them. Police were placed about the legation to arrest all persons entering or leaving the premises. This was on the 30th of August, and they were not withdrawn until January 12, 1892, when Mr. Egan succeeded in embarking those that remained with him, after an expense of some $5,000 for their entertainment, as he states in his dispatch of November 16th. The Chilian government charged that the legation was a hotbed of conspiracy against the state, an allegation which met with a strenuous denial from Mr. Egan, but the feeling which was worked up by the sheltering of the fugitives led to the outbreak against the "Americanos," crew of the *Baltimore*. Although ultimately giving the refugees permission to leave the country, the Chilian government protested to the last that it could consistently grant no "safe conduct." Owing to the *Baltimore* incident of October 16th, these matters were completely swallowed up in the more trying complications, and little appears from the state department either confirming or negativing Minister Egan's attitude in this respect. All that there is appears confirmatory of even Mr. Egan's advanced position: —

> The government of the United States is prepared to consider in a friendly spirit the question as to whether asylum has been properly given, * * * but it can not allow to pass without firm protest the evidence of disrespect toward its minister. The right of asylum having been tacitly if not expressly allowed to other foreign legations, and having been exercised by our minister with the old government in the interest and for the safety of the adherents of the party now in power, the President can not but regard the application of another rule as the manifestation of a most unfriendly spirit. The utmost precaution must be taken to prevent any abuse of the privilege of asylum. (Secretary Wharton to Minister Egan.)
>
> I thank your excellency for the recognition which you concede to this

legation of a principle which forms an integral part of the international practice of my country, — to grant asylum to the refugees of a political character who seek the protection which civilization and humanity counsel. * * * The refugees are virtually in foreign country [October 17th], and the decree of the minister of justice [subjecting the refugees to the judicial power of Chili] can not destroy the usages and customs that are international, nor reach the persons who are in the legations and beyond its jurisdiction. * * * Therefore the government is at perfect liberty to concede the safe conducts [citing Chilian instructions at Lima in 1866, and the statement of the Chilian delegate at a congress at Montevideo in 1888], which is a necessary adjunct of the right of asylum. It is absurd to consider that the right of asylum should be made a mockery by converting the legation into a permanent prison. (Minister Egan to Señor Matta.)

Señor Matta contended that safe conducts could not be asked as a matter of right, but only as an act of "courtesy and the spontaneous will of the government," and that he could not grant the same after having indicted the refugees as offenders against the laws of his country. He further contended that, as the right of asylum extended only to the premises of the minister, the constant surveillance was justifiable when done upon the by-roads and streets leading to the legation.

30. On January 7th, 1892, Minister Durham of Hayti reported that two refugees had asked the asylum of his residence. He declined to entertain the applications and the two men were received at the French legation and were given asylum there. Mr. Blaine said:

The practice has several times been very positively discountenanced by the instructions of the Department and certainly no support can be found for its exercise in advance of apprehended necessity therefor. You should scrupulously abstain from any action which might bear the appearance of inviting asylum or improvidently granting shelter.

31. In 1893, Secretary Gresham cordially approved Minister Baker's refusal to shelter a Nicaraguan revolutionist. 32. April 10, 1893, Minister Egan became again embroiled in a difficulty in sheltering leaders of the revolutionary party, for whom the public prosecutor had demanded the sentence of death, but who had not been tried. The matter was referred in a friendly way to Washington. Ultimately, it was decided that there was no right of

shelter, since, besides the political offenses charged, the refugees were under indictment for "sedition, riot, insurrection, and mutiny," prior to the political disturbance upon which they took refuge; and, upon assurance of civil trial and protection from violence, Minister Egan was instructed to require them to leave the legation. Mr. Gresham telegraphed: "You are not authorized to protect refugees against police officers for violation of the laws of their country." 33. Sept. 1, 1895, General Savasti, in command of the government forces of Ecuador, was defeated, and, sick and wounded, made his way to the American legation. Minister Tillman, during the month preceding, had refused all applications for asylum, but upon the overthrow of the government and the abandonment by the administration of the public offices, his legation became full of men, women, and children, while the defeated general also found a refuge therein. His entire course was approved by Secretary Olney. He considered that the shelter given was "not in the nature of an asylum." He also said:

> It seems to be very generally supposed that the case of a member of an overturned titular government is different; and so it may be until the empire of law is restored and the successful revolution establishes itself in turn as the rightful government competent to administer law and justice in orderly process. Until that happens, the humane accordance of shelter from lawlessness may be justifiable; but when the authority of the state is re-established upon an orderly footing, no disparagement of its powers under the mistaken fiction of extra-territoriality can be countenanced on the part of the representatives of this government. * * * The practice of asylum can only find excuse when tacitly invited and consented to by the state within whose jurisdiction it may be practiced.

34. On Feb. 3, 1896, Minister Smythe sent the following message: "Protection asked by a political suspect denounced by the government. To-day I ask the 'usual courtesy' to place him on some outgoing vessel." This was answered February 18th by Mr. Olney in the following caustic manner: —

> No right to protect such persons by harboring them or withdrawing them from the territorial jurisdiction of their sovereign is or can be claimed on behalf of the diplomatic agents of this government. * * * Your request for the "usual courtesy" is not understood. * * * If the

Haytien government should exercise its evident right to refuse you such permission, you would be placed in a wholly indefensible position. The "usual courtsey" of which you speak appears to be only another name for the practice of that form of alien protection * * * which this government condemns. Whatever the result of your request, notify the refugee that you can no longer extend to him your personal hospitality.

35. The American legation in Ecuador in March, 1896, occupied but a part of a certain building — the upper floors. One Colonel Hidalgo was concealed in the rear of the building, but outside of the part occupied by the minister. Finding that he could not escape, he requested Minister Tillman to tender his surrender upon promises of kind treatment and a fair trial. Mr. Olney said: —

You are responsible only for such part of your premises as you may actually rent and occupy, and, while you will neither invite nor tolerate abuse of your individual habitation as a refuge for evil-doers or suspects, you can not permit any inference that you are to be regarded as accountable with respect to the other part of the building.

This statement following, as well as a repetition of the language used in 23, *supra*, was allowed by Secretary Olney to pass without comment: —

Under international law, the legations are regarded as asylums for persons pursued by mob violence, but not for conspirators when they may be demanded by regular proceedings from proper officials.

36. In the Foreign Relations Reports of 1898, there appears a communication from Bridgman, Minister to Bolivia, containing a memorandum drawn by himself and signed also by the French and Brazilian Ministers, prescribing the conditions under which asylum would in the future be afforded at La Paz. These, in general, required a formal application for protection by the refugee, with a statement of his name, official capacity, and his reasons for seeking refuge, an agreement that the authorities should be at once notified of his place of refuge, and his undertaking to remain within the legation without communication with outside persons, and to depart, or surrender himself, when requested so to do. The communication was received at Washington without comment.

37. On January 16, 1899, Sampson, Minister to Ecuador, wrote

that he had given assurances that he would give asylum to the vice-president (the president being temporarily absent), the chiefs of the army, and all the members of the cabinet with their families, in the event that a threatening revolution was successful. The rebellion was suppressed, so that there was no necessity for giving the promised asylum, but further correspondence ensued, Mr. Hay calling attention to the general discouragement of the practice. Mr. Sampson justified his course upon the ground that the refugees in question were "neither unsuccessful insurgents or offenders against the laws," but the "legitimate heads of the government" temporarily in eclipse by reason of the activities of the two undesirable classes mentioned. Mr. Hay then replied:

> Its exercise is not the exercise of a strictly diplomatic right or prerogative, and being founded alone in motives of humanity, it should be rigidly restricted to the necessities of the case, which are generally characterized by features of lawlessness and mob violence. * * * A general rule in the abstract can not be laid down for the inflexible guidance of the diplomatic representatives of this government in according shelter to those requesting it. But certain limitations to such grant are recognized. It should not in any case take the form of a direct or indirect intervention in the internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government. I therefore regret that I am unable to approve the promise of shelter made by you before the emergency had actually arisen for decision as to whether the circumstances then existing would justify or make it permissible, and especially am I unable to approve the apparent ground or motive of the promise, that you would have saved from death the legitimate heads of the Government until such time as they would again assume the functions of their respective offices. The Government of the United States remains a passive spectator of such conflicts unless its own interests or the interests of its citizens are involved.

38. On August 2, 1899, Minister Powell of Hayti telegraphed that a Haytien who had struggled into the legation dragging his captor with him, had been removed by force, and that his return and an apology had been demanded. The refugee was thereupon returned and the apology was given. Subsequently, Mr. Powell extended the protection of the legation to several former officers of the government. The officials now in power later decreed that all refugees in

legations should leave the country by first steamer. Mr. Adee, acting secretary of state, sent a telegram that the "Haytien government has a right to expel its own citizens and you cannot shield them from the order simply because they happen to be your guests. You may shelter those under immediate apprehension of lawless violence, but cannot harbor an accused offender against Haytien law." As the refugees were about to be embarked, the president of Hayti requested that this be delayed for a few days. After the lapse of two weeks, Mr. Powell, not having had further word from the Haytien government, assisted the refugees in departing, whereupon he seems to have received a reprimand from Mr. Adee and Mr. Hay, upon the view that the order of the Haytien government was not executable by the United States minister, and that his instructions meant only that Mr. Powell should inform the refugees that protection was withdrawn and request them that they should leave his premises, not that he should become in any way responsible for their deportation. Mr. Powell disavowed the impression that he was participating in any Haytien order of expulsion, but asserted that he was merely giving personal aid to the refugees in their embarkation. Mr. Adee, on August 3, gave a long but not wholly comprehensible general instruction. He asserted that there was a difference between affording or offering asylum and in having the legation invaded in a disorderly pursuit after a refugee actually enjoying protection. He said further:

> When the refugee is pursued in regular course of law, he may not be formally surrendered by the minister to the agent of the law. This would virtually be an assumption by the envoy of a non-existent function of surrender by way of quasi-extradition, for which no warrant of international or statutory law can be adduced. * * * Sentiments of humanity and abstract justice counsel the affordance of shelter to an unfortunate person from lawless violence; but such shelter is a different thing from a claim of asylum from the regular justice of the territorial sovereign. Upon sufficient allegation of the criminality of the refugee, and upon adequate showing of the regularity of the judicial proceedings had against him, the right of the envoy to harbor him disappears. Evidence of the criminality and of the regularity of the legal process should be made known to the envoy through the diplomatic channel and not by invasion of his domicil.

The last sentence of the quotation seems to run counter to the first. Mr. Hay advised Mr. Powell to "study and be governed in any applicable instance by the voluminous instructions of my predecessors." Mr. Powell replied:

> Not one of my predecessors has been able literally to carry out the instructions of the Department, and I am forced to add that it will be impossible for my successors to act differently from the course pursued by their predecessors as long as the other legations receive and protect those that come to them in such emergencies. * * * I feel that the Department must trust to the discretion of its representative as each emergency occurs. * * * His first duty should be to bring all the facts without comment to the immediate attention of the Department and await instructions. * * * A refugee comes to us; asks protection; we refuse to extend it to him; in return he refuses to leave our premises. Are we to use force to compel him to leave? We can not ask the Government to aid us. That would violate the sanctity of our legation. Here is another phase of the question on which I would like the Department to instruct me. * * * There is but one solution to the question, I think, and that is for each legation absolutely to refuse to shelter any one but members of the Government, in case of a revolution only.

Mr. Hay closed the correspondence by saying only, "The only safe course would seem to be to bring all the facts to the immediate attention of the Department and await its instructions. * * * The Department is content to let the matter rest upon its last instructions and your present dispatch."

39. Minister Powell, on July 17, 1902, addressed a letter to Mr. Hay, pointing out the difficulties, dangers, and unpleasant features of the practical exercise of the right. He stated that some plan should be devised to prevent the professional conspirator from abusing the privilege but felt that joint action on the part of all the legations would be necessary to control the practice. He said: "I believe though that when a member of the Government seeks asylum to escape the mad passions of an excited populace, that it is our duty to give him the protection for which he seeks. * * * I have the honor to enclose certain suggestion of which I should like to have the approval of the Department before carrying the same into effect." This statement formulated six rules to the effect that the "courtesy" will be allowed only for a limited period to persons

charged with political offenses as distinct from those in violation of the penal laws; that the legation would not assist in the embarkation of refugees; that all weapons should be surrendered and no communication should be had, while the person enjoying the "hospitality" should assume the expense of his own maintenance.

Mr. Adee ignored the specific suggestions and returned further general directions. He said:

> You will not consider for a moment the wholly immaterial question whether the person seeking the asylum may or may not become the executive of the Government or whether one or the other of the contending parties may succeed or fail.
>
> There is not known to the law of Nations, nor does the Government of the United States in practice, recognize any right of asylum in the legations of refugees from the scenes and disorders of civil conflict. Any claim or assertion of such right, as such, is not to be conceded or recognized for a moment. The privilege of refuge may in the execution of a sound discretion and under the previous ruling and instructions of the Department, sometimes be granted, under the restrictions stated, and solely from motives of humanity which is the principle governing the grant of the privilege. Questions of political expediency have no place in the consideration of the principal question.

40. Mr. Powell, on August 14, refused protection to a Dominican (who was a follower of a revolutionary leader in Santo Domingo and whose arrest was sought by the Haytian government under an extradition treaty with Santo Domingo) upon the grounds that the legation could not afford protection to those who were actually conspiring against a friendly government, that this man was guilty of such conduct and in that respect his case differed from that of the Haytiens involved in the preceding controversy, who were, in his judgment, innocent. Mr. Hay questioned the capacity of a minister to judge of the guilt or innocence upon this point of persons applying for shelter, but approved the action of the minister because "it is not shown there existed such circumstances of danger from lawless violence as makes it sometimes permissible to afford shelter." Mr. Powell made this comment: "The life of a minister to Hayti seems mainly devoted to these questions and difficulties. The question of asylum has been one of the principal questions which the department has been called upon by each of our representatives to decide."

41. On February 1, 1904, the government of Santo Domingo demanded the delivery over of the late governor, who had taken refuge in the office of the consular agent at Samana. This was refused, but a force of armed men invaded the premises and took away the political refugee against the protest of the agent. Mr. Powell, as minister, was instructed that the authorities went beyond their rights in forcibly invading the office, and was directed by Mr. Hay to make proper representations of protest. He says: "While the vice commercial-agent was perhaps over-zealous he was probably justified under the peculiar custom which prevails in the Dominican Republic."

42. On August 11, 1904, Mr. Ruffin, consul at Asuncion, Paraguay, telegraphed that a revolution had broken out, and inquired whether "this consulate should grant asylum." Mr. Adee succinctly replied: "Consulate should not be used as an asylum for political refugees."

43. On June 6, 1905, Mr. Powell sent information that he had given asylum "until the Government gives them permission to leave the country" to two members of the national auditing committee, who had reported officially that there were no vouchers for the expenditures of large sums of public money and who had thereby incurred the bitter enmity of the government, which, Mr. Powell asserts, was about to have them shot. Before the communication was received at Washington they returned home, upon the personal guarantee of the President of Hayti, but one again returned to the legation, fearful of presidential duplicity. Acting Secretary of State Peirce replied to the notes of information, regretting the inability of the Department to approve of Mr. Powell's actions, basing the conclusion largely upon the grounds (1) that the facts disclosed no imminent peril to life or of mob violence, and (2), that the effect was to shield the refugees from whatever legal liability they were under, if any, to the Haytien laws. "This could not possibly have justified the interference of the legation in a controversy which appears to be on the whole of a purely political character." Mr. Powell was told that "It is expected that the instructions of the Department will be carefully considered and observed in the future."

PRINCIPLES INVOLVED

From a legal standpoint alone, omitting for the present all questions of humanity and of practical policy, there are two grounds upon which the practice of asylum has been sought to be justified. I. Exterritoriality. II. Acquiescence and Usage.

I

Secretary Bayard touches the heart of the whole matter when, in his letter of 1885, to Minister Scruggs, of Colombia, he states that the whole question of asylum has been much obscured by treating as a matter of fact a mere figure of speech.

From the earliest times it has been considered necessary to grant to an ambassador residing in a foreign state certain legal immunities. Accordingly he has been exempt from the operation of the local law as respects his person, his family, his suite, and, for the most part, as to his residence — this upon the two grounds of courtesy and convenience. To embrace within one general phrase the whole circle of his immunities, as well as to include the right contended for him of judicial control over his premises, and to emphasize the nationality of his children born while abroad, the term "exterritoriality" came into use. By this figure of speech the idea became implanted that, although the minister selected his domicile within foreign territory, yet by that selection his residence lost its former character and came *pro tempore* under the control of his sovereign as part of his territory. That this view involved by an imperfect conception of the true principles, and unwarrantably limited the idea of sovereignty of the accredited state over its own dominions, is to-day admitted, but with this comprehensive figure of speech taken as a basis, and accepted as a fact, it followed as a logical sequence that the minister's house could not be invaded by the government upon any pretext, any more than could the capital of the state from which he was sent. Consequently, if any one escaped to the asylum of the legation, it lay within the power of the ambassador, doing justice according to his own peculiar views, to say whether or not as a matter of courtesy (the courtesy thus became transferred to the wrong side of the account) he would surrender the refugee to the

government from which he was fleeing, but he would admit of no right lying in the local government to demand the fugitive. The man was within the territory of a foreign power, over which the local jurisdiction, *a priori,* could not extend; and although the extreme absurdity of extradition was probably never claimed, yet, in some of the negotiations carried on between the countries from time to time involved, striking analogies to this process are to be found. This is the doctrine of asylum developed to its extreme limits.

Evidence of the presence of this idea in our diplomatic correspondence may be found in cases 3, 8 (wherein the French minister, M. de Lesseps, said that it was necessary "before all things to save the principles of inviolability and exterritoriality"), 9, 19, 24, 28, 29, *supra.* In only one, *i. e.,* no. 24, of these instances did it meet with the express disavowal of our government, although it is impossible, upon reading through our diplomatic correspondence in its entirety, to believe that the United States government sanctions, or ever has sanctioned, or even recognizes, the doctrine of exterritoriality as thus applied. Mr. Olney, in case 33, spoke of it as "a mistaken fiction."

Our government holds that its ministers, their families, their suites, their servants, and their residences, are to be accorded all the rights of personal immunity that have been granted diplomatic representatives at all times, so far as may be necessary to their comfort and convenience, but this is a far different thing from saying that this immunity stretches to such an extent as to allow a minister to set up in the midst of another nation an independent sovereignty of his own which cannot be entered save by an unfriendly act. He may well be granted the privilege of seeing that justice is done upon those members of his household, who by their official relation stand upon a similar basis with himself, — he may insist upon the prerogative of redress among them, perhaps; but this, too, is a far different thing from saying that a citizen of another country may, by simply passing the portals of his door, place himself in the same position as the *bona fide* members of his suite. Besides, good faith would seem to require that his household be kept above suspicion, and that it should at all times be open to the view of the accredited state; his tenure there is

dependent upon the will of the sovereign to whom he is sent, and his rights rest, therefore, upon that sovereign's courtesy, not upon some temporary quasi-soil-ownership.

Simply stated, the claim is too broad; it takes too much as proved; the territory of the legation is not the territory of the legate-nation.

II

Premising, then, that there is no legal basis from principle to justify the doctrine of asylum, we come to consider the question of acquiescence and usage as affecting its practice. Thus: Minister Bassett speaks of the existence of the custom for seventy years in Hayti (case 19, 1875). The Minister of Brazil (case 7) states that the "right had been officially recognized and constantly respected by all the governments in Peru since its independence." Mr. Powell, in 1899 (case 38), says:

> This right of asylum, as they claim, has become almost an absolute law to them; the National Government recognizes it. Many of those now in power have in the past few years been refugees in this or some of our sister legations. This assumption on their part is not of recent date but existed long before Hayti was recognized by our Government as an independent power.

The usage seems to have grown up entirely in recognition of the instability of the various governments of the smaller American countries and the ardent vengeance with which each political suspect or revolutionist was hunted out when his faction was defeated. Some writer calls Peru "that classic country of revolution," and Mr. Seward speaks of the "chronic condition of rebellion" throughout Spanish America. In such a state of affairs it was no wonder that each ephemeral president and his cabinet felt a personal interest in maintaining a custom to the existence of which he might owe his life on the morrow. It was but natural that men should wish to preserve a retreat for themselves in such kaleidoscopic countries, where the conspirators of Monday might form the government of Tuesday, and the statesmen of the morning might be but outlaws in the afternoon. Thus we find (case 19) Mr. Bassett stating: "The right of asylum has never been renounced by this government

(Hayti), and it practically has refused to assent to its discontinuance. * * * The Haytien plenipotentiary would not agree to having the exercise of this right taken away from even our consulates in the inferior ports." True, each government that happened to be in power for the time being would demand that any fugitives then in shelter should be surrendered, but it preferred always to predicate its request upon some ground which still recognized the existence of the custom, but contended that the present case was without the pale of its proper exercise.[5]

Thus it is that to-day, so far as now appears, there is but the one country of South America in which the custom is not recognized, *i. e.* Peru (case 8), while Great Britain has discarded the privilege with reference to its consular offices in Hayti.[6]

Apart from questions of humanity, the chief basis of our attitude has been that this government wishes no "invidious distinction to be made against its ministers." (Case 29, and see case 26.) So, Mr. Secretary Seward (May 1, 1868) was unwilling that the right should be "relinquished any sooner, or in any greater degree than it is renounced by the legations of the other neutral powers." Mr. Fish makes a statement somewhat variant when he says (case 19):[7] "The course of other states in receiving political refugees is not sufficient to sanction a similar step for us." A few days later, however, he remarks: "We would prefer, therefore, not to formally assent * * * without ascertaining the views of other governments." Mr. Powell, minister to Hayti (case 40), points out a practical disadvantage in adopting a policy wholly independent of other powers. He says: "The one you refuse shelter to to-day is apt to be the executive the week, or month after, in which case, for this indiscretion, if it may be so termed, the country that you represent suffers in its diplomatic relations, or else a request is conveyed to your government for your recall."

Paragraph 51 of the standing instructions to diplomatic officers of the United States is as follows:

[5] As in cases 7, 19, 29, 32, and 35.

[6] *Cf.* Foreign Relations Reports, 1875, p. 682.

[7] Fish to Preston, case 19.

In some countries where frequent insurrections occur and consequent instability of government exists, the practice of extra-territorial asylum has become so firmly established that it is often envoked by unsuccessful insurgents, and is practically recognized by the local government to the extent even of respecting the premises of a consulate in which such fugitive may take refuge. This government does not sanction the usage and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its representatives to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.

We thus reach a conclusion that, owing to the long continuance of the custom and the acquiescence therein of the local governments, the nations of the world in general and the United States in particular, notwithstanding its qualified denunciation, while disavowing the usage in legal theory, will claim under certain conditions the quasi-right of being accorded the same privileges of asylum as have hitherto been granted in Central and South America. And until an express renunciation by the particular state in question, as by Peru in 1867, or a general agreement among the powers to cease the practice, the question is liable to repeatedly reappear in diplomatic correspondence.

Just what are those conditions under which the United States will again claim protection for refugees, and what the attitude of the government actually has been in the past will more clearly appear by re-subdividing the cases cited into groups classified by some similar circumstances, and by first viewing the subject generally in the negative light of certain

LIMITATIONS.

In earlier times, the reverse of the present position was held in reference to the question, "Who may rightly seek the privilege of asylum?" Martens, in 1789,[8] declared that asylum was allowed for private crimes, but not for political refugees if their surrender were demanded. Possibly a trace of this may still be seen in case 43, where the Department of State deprecates the interference of Mr. Powell in

[8] Polson, Law of Nations, sec. 32.

a matter "on the whole of a purely political character." Probably Mr. Powell, however, had in mind the absence of mob, as distinguished from governmental violence. Vattel considered that it might be allowed to those who "often prove to be unfortunate rather than criminal," a status so difficult of ascertainment in the heat of the circumstances attending the request for asylum as to mean little unless it means political offenders. At any rate, to-day the privilege is confined to political refugees, and our state department entirely disavows any protection afforded to mere criminals.[9] * * * Just who are "criminals," however, and hence should be surrendered, has been a difficult nut to crack, and has been a matter of contention in some of the important cases (as in 9, 19, 32, and 38). The government has apparently construed the question leniently, and has usually given the benefit of the doubt to the refugee, if the popular passion seemed great or if the country were in a general uproar. Such things have been left to the discretion of the minister upon the scene, who better could judge of the temper of the people and the real reason back of the demand for the fugitive, in all save (case 32) Minister Egan's second imbroglio. One can see in this latter decision a concession made to Chili to smooth the feathers ruffled in 1891. In this case, the department seemed over-anxious to make the offenders out as criminals rather than outwitted politicians. They were indicted for "sedition, riot, insurrection, and mutiny." If this is a criminal charge it is rather equivocal, and has all the look of a mere political indictment.

The fact that a prior trial has been had and a conviction obtained for political wrong-doing before the refuge has been sought should be a reason for the surrender of the fugitive, since the custom has arisen mainly for that temporary protection until passion should subside and a fair hearing be granted. If that trial has been already had there seems no reason why this desideratum is not already obtained. That a mere indictment had been had for prior criminal acts, although the refugees had been guilty of subsequent political offences, was considered sufficient reason for the surrender of the

[9] See cases 7, 9, 17, 18, 19, 20, 23, 32, 37, and 40, and par. 51, of Standing Diplomatic Instructions.

Chilian fugitives in case 32.[10] Quite different is the trial "par contumace," an *ex parte* proceeding conducted though the refugee be still under the legation roof, which appears in the extended reports of case 19. Mr. Moore[11] contends that such a proceeding is entirely warrantable, but in view of the fact that it is easily liable to abuse, the suspicion with which Minister Bassett looked upon the practice doubtless justified our government in its refusal to surrender the refugees, upon the ground that they had been proved criminals only in a trial where they were not present to defend.[12]

An obvious limitation is that the right is confined to the premises of the legation itself. Boisrond Canal took refuge in the country home of Mr. Bassett, but since the minister was then occupying it as his personal residence, no question was raised. The continual annoyance in ceaseless shouting and the interruption of free passage which Mr. Bassett here suffered (as did also Mr. Egan, in case 29), were unjustified, although they did take place beyond the bounds of the legation, in the streets and roads surrounding it. We were doubtless right, despite Mr. Matta's reasoning, in treating these acts as wanton insults. As Mr. Egan tersely put it: "It is absurd to consider that the right of asylum should be made a mockery by converting the legation into a permanent prison." An unjustified use of his personal immunity was made by the Argentine minister in Colombia in 1885, in removing his effects to the home of the person sought to be arrested, and there protecting him. A legation can scarcely be the ambulatory thing he sought to make it, unless Mr. Blaine's position in the Barrundia case (28) be conceded. The Hidalgo matter in 1896 (35) shows the narrowness with which it is proper to construe the limits of the legation.

A considerable amount of the irritation in the two principal cases, 19 and 29, was caused by the belief of the local governments that the refugees were communicating with their partisans, and that the legation was thus but the centre and fountain-head of the opposing propaganda. There seems to have been no real ground for that

[10] See also case 29, *semble*, as a reason for refusing safe conducts.

[11] 7 P. S. Q., p. 229.

[12] *Cf.* also Foreign Relations Reports, 1891.

belief in the Haytien matter, and little room for it in the Chilian controversy, in view of the fact that several hundred police constantly patrolled the legation premises. Though it was claimed by the Haytien government that the refugees retained arms and ammunition in their possession, the allegation was flatly denied by our minister, who stated the position of our government to be that it "would never tolerate any act of a hostile nature on the part of any refugee within the legation, while it is absurd to suppose that the official residence of the minister of a friendly foreign power is to be made an arsenal for the storing of arms and ammunition, or become the basis of operations against the existing government." Mr. Powell, in the correspondence of case 40, however, makes a confession that such things are not inconceivable; he says "the right has been abused many times, as the refugee has from within his asylum formulated plans which have resulted in the disruption of the Government." The Department of State has, however, at all times been zealous to avoid such a result.

Another limitation ordinarily found in the granting of the privilege is that the minister furnishes upon request a list of the refugees. Such was the case in 9, 17, and 21. Minister Bassett's refusal in 1875 to do so seems entirely satisfactory, for the true basis for furnishing the list seems to be the one he gives, *i. e.* to facilitate the embarkation of the refugees. The granting of the list appears to be a manifest courtesy, but not a requisite, save in making out safe-conducts and in preparations for departure.

Any attempt on the part of our diplomatic representatives to formulate definite rules for the regulation of the practice has met with an indifferent reception at Washington. It is to be regretted that the department has been unwilling to attempt more clearly to prescribe the conditions and limitations which should govern in cases where asylum is granted, but it has consistently ignored any such effort (cases 36 and 39). It would seem that the well-meant attempt of Mr. Powell in the latter instance should have merited more attention, as a practical measure to circumscribe the evils attendant upon the custom, and that a little less of generality and a little more of attention to specific recommendations would lead to a better understanding.

The position of the department no doubt is, that to formulate rules and regulations would be too great a recognition of the custom as a right. However, as has been disclosed, the custom is for the present ineradicable, and its evils may be minimized by making the conditions of its exercise more definite rather than by ignoring it until a practical case arises for determination. It might even be said by inappreciative persons that the department shows evidences of preferring to leave the whole matter in as indefinite a condition as possible, in order to be able to approve, criticise, or disavow any action taken in a given case, as best suits the exigencies of the whole situation. This much can be asserted with distinctness that the life of a minister to a Central or South American country is not an easy one, when the question of asylum is raised. He is likely to find himself unpopular and "lacking in tact" if he refuses asylum, and he is quite sure of receiving a reprimand, or at least a caution, in case he grants it, while (as in case 38) he may find refugees encamped upon him, quite without his own consent. It is impossible to read the reports without drawing the conclusion that the minister generally regrets his action sooner or later, whatever it may have been. The spirit of technical and carping criticism too often appears in the replies from the State Department, when, as far as can be judged from the correspondence, the minister has distinctly kept within the limits of paragraph 51 of his instructions, nor has recent correspondence served to illuminate, but rather to befog the real position of the government.

Having seen that both writers upon international law and governments at large discountenance any legal theory of asylum, and maintain it only in a certain limited sphere, upon limited conditions, and predicate their attitude then only upon past usage, we now look to see whether or not the policy of continuing the practice be not, like the theories that gave it birth, entirely fallacious.

The practice of giving asylum has been and still is a prolific source of revolutions in and the instability of South American republics. The traitor feels assured that if he fails in his rebellion he has only to flee to the house of the minister, where he is protected with tender solicitude. Thus encouraged, he launches recklessly into his schemes, and the country is kept in continual commotion. (Minister Hovey, Peru, 1866.)

One of the greatest difficulties which a foreign minister has to meet

here grows out of the mistaken notion that legations are "cities of refuge" where every class of law-breakers is safe from arrest. So general is the misunderstanding that a thief or a deserter or an assassin considers himself safe if he can secure admission by force or fraud into a building occupied by a foreign minister. (Minister Tillman, Ecuador, 1896.)

Among other objections to granting such asylum, it may be remarked that that fact obviously tends so far to incite conspiracies against governments that if persons charged with offenses can be sure of being screened in a foreign legation from arrest, they will be much more apt to attempt the overthrow of authority than if such a place of refuge were not open to them. (Secretary Fish, 1870.)

It is surprising to witness the readiness and assurance with which a defeated revolutionist approaches the door of such places, demanding as a matter of right admission and protection. Before the revolutionary attempt is made, when the probabilities of success or defeat are being calculated, this protection in case of defeat is regarded and accounted as sure. (Minister Langston, Haiti 1878.)

The idea in South America is deeply rooted, among the populace at least, that a foreign legation is legally a refuge for all sorts of criminals who may remain in safety from lawful or unlawful pursuit. (Minister Bridgman, Bolivia, 1898.)

These quotations show clearly the abuse to which the practice is liable and which seems its necessary adjunct, and, in confirmation thereof, may be stated again the cases of Boisrond Canal, at least three times a refugee, who returned as president three weeks after his embarkation from our legation, and those of Canseco in Peru and Granadas in Guatemala, each of whom owed his quickly subsequent presidency to his timely American shelter. Every fact that appears in the reports bears out the statements cited above, and though the question is a complex one, it may well be doubted if the humanity which prompts the shelter of refugees is in the long run humanity at all, but is not rather the cause more than the subsequent of the turmoil of the Spanish states. It is scarcely to be denied that "the practice tends to the encouragement of offences for which asylum may be desired." Add to this the expense and trouble entailed upon the ministers in granting the privilege, and the constant irritation engendered whenever its exercise is called into play, and we may well question whether stability will not be fostered and justice better secured by leaving the states in question to work out their own salvation in their own way; to apply to the Spanish American states

..hat a great writer on international law, Merlin, has stated in general: "What, then, is the proper way to end all disputes with regard to the right of asylum? It is to return to the general principle which we have laid down; it is to acknowledge positively that this so-called right is only an abuse, an outrage against the sovereign authority, and that no consideration should cause it to be tolerated;" or, as Phillimore has called it, "a monstrous and unnecessary abuse."

THE COURSE OF THE UNITED STATES GOVERNMENT

While our government in several of its dispatches asserts that its course has been marked by consistency, it is warrantable to reach an opposite result by reading through its own utterances. While there runs through the instructions a certain similarity of phrase, yet we must conclude that the main end of the government has been to keep out of difficulties, and that it is impossible to tell in just what case a minister would be safe in granting the privilege, although he is yet not *forbidden* to do so by the tenor of his instructions. Nowhere is this more strikingly illustrated than in our attitude regarding *consular* protection. In cases 2, 4, 6 it was positively stated that no such usage existed, while in case 5 (six years previous to case 6) it was practically conceded that there was such a custom. In 1872 (case 14) cases 2, 4, and 6 were disregarded and 5 followed, and in the following year, case 15, the inference was that the department's wrath was roused not by the surrender of the fugitive, but by the violence of the entry. Case 21 inclines to the negative view of 6. The department in cases 23, 25, and 26, states that legations and consulates stand on the same footing. In case 41 it is said that the vice-consul was "probably justified under the peculiar custom which prevails in the Dominican Republic. The violence of the entry, of course, was unjustifiable. In case 42, the department telegraphed, "Consulate should not be used as an asylum for political refugees." How a claim for consistency can be maintained in a record of this sort (no, no, yes, no, yes, no, no, yes, yes, yes, yes, no) is inconceivable.

It is only by dividing the cases into three groups that order can be found in the decisions made, although it is to be admitted that the general course has been to deprecate the practice.

I. CASES WHEREIN ASYLUM HAS BEEN REFUSED

In all of these instances [13] save the Barrundia episode, the government has unqualifiedly approved the action of the representatives of the United States in refusing asylum. The last-named case must stand, upon precedent, as a mistake of Mr. Blaine's, for it is the only case in the history of our diplomacy where a minister was censured after refusing shelter. Certain different questions of course arise, since the affair took place upon a vessel in harbor, but Mr. Blaine's whole argument is permeated with the view that "the abandonment of such a privilege" cannot be approved. He says nothing in regard to the discretion of the minister in such cases, which seems to be the keynote of the standing instructions.

II. CASES WHEREIN ASYLUM HAS BEEN GRANTED

We do not find unanimity in those cases wherein asylum has been granted, but slight difficulty has arisen, and the matter has been referred for comment.[14]

In general, there has been a qualified approval of the action of the minister, but with directions to be circumspect as to similar action in the future. In cases 2, 4, 15, 21, 32, 34, 37, 38, and 43, the granting of asylum was condemned. The first four instances may be distinguished upon the ground that they involve consular protection, concerning which the policy of the government down to case 42 seems clearly reversed. Case 32 may be distinguished as having (in the view of the department) concerned actual criminals; cases 34 and 43 upon the ground that there was no imminent peril from mob violence; case 37, in that it was a promise as to future protection before the emergency had actually arisen; and case 38, again upon the basis that the refugee was merely a criminal. Case 32 is the only one in which the refugees seem actually to have been turned out after having secured the asylum.

Two cases 19 (Boisrond Canal) and 29 (The Chilean difficulty) deserve more extended mention because of the great irritation under

[13] These are cases 7, 8, 17, 18, 20, 28, 30, 31, and 40.

[14] These are cases 3, 5, 9, 12, 13, 14, 16, 22, 33, 34, 35, 37, 38, 41, and 43.

which they were decided and because they threatened real international complications. In the first, the government failed to support Minister Bassett with entire sympathy. It did not consent to the surrender of the refugee, but was willing to state to the Haytien envoy that "Mr. Bassett has thought proper to take the responsibility of harboring the persons referred to contrary to the wishes of his own government. This act has not been approved by this department, as it is not sanctioned by public law, though it is in conformity with precedent in that quarter.[15] It wrote to Mr. Bassett,[16] "Although you should not have received those persons, it was not deemed expedient" to comply with the request to set them at large. The only reason Mr. Bassett's act was not disavowed lay in the gravity of the situation. One is disposed to side with Mr. Bassett, to feel that his position, though not all his arguments, has been abundantly vindicated by the subsequent attitude of the department, and to wonder how he could have done differently than he did under the present standing instructions, or under the instructions given to him subsequent to the imbroglio, had he received them in advance.

In the Chilean difficulty, although Mr. Egan went out of his way in affording opportunities for gratuitous insults and friction, and was indefensibly wrong in arguing from the untenable ground of exterritoriality, he was sustained throughout. It seems regrettable, however, that some of the considerateness shown Mr. Egan could not have been used toward Mr. Bassett, and that some of the strong language employed toward Mr. Bassett was not used in the correspondence with Mr. Egan. Each case seems to have been in its beginning a proper enough exercise of the ministerial discretion. Mr. Egan's weakness lay in a less tactful handling of the difficulties and his greater partisanship in behalf of the refugees.

III. CASES IN WHICH INSTRUCTIONS ARE ASKED AS TO FUTURE ASYLUM

The real place to look for the policy of the government is in its instructions, based not upon a case then pending, but upon its directions for future guidance, since then the doctrine may be found un-

[15] Foreign Relations Reports, 1875, p. 739.
[16] *Ib.*, p. 701.

trammelled by any of the complications of an actual difficulty. The two earlier cases, 1, 6, are to the effect that asylum is improper if there be objection to its exercise. Then follows the long list of instances [17] which show the steady theoretical policy of the country (apart from the decision of actual cases) from 1868 to 1902. The meat of these instructions is that mentioned before (*supra*):

> While discountenancing the custom, the United States is indisposed from obvious motives of humanity to deny temporary shelter to any unfortunates threatened with mob violence.

That the limitation contained in the term " mob violence " is a real one, witness Mr. Olney's savage utterance in case 34 and Mr. Hay's approval of Mr. Powell's action in refusing asylum in case 40 upon the ground that there was no evidence of lawless violence, as well as in the warning constantly given that any tender of protection in advance of actual necessity is to be discountenanced (cases 37 and 42).

HOW WILL ANY FUTURE DIFFICULTY BE DISPOSED OF?

The following statements possibly are indicative of our future policy, and, upon the whole, they perhaps summarize the true position of the Department of State in the past, when the occasional lapses, variations, and inconsistencies have been harmonized or forgotten:

(*a*) The United States refuses to recognize that there is any right of asylum by the law of nations.

(*b*) Yet, by long acquiescence and usage, in the countries of Spanish America, such a custom does exist.

(*c*) This government is unwilling, acting independently, to assent to its entire abolishment, but expects the same privileges, if demanded, that are accorded the other powers, and will not tolerate invasion of a legation or of a consulate whenever protection has actually been extended. However,

(*d*) It believes that this custom, as practiced in the past, is as bad in policy as it is erroneous in principle; that it tends to aggravate those conditions which called it into being; that it is subject to great abuse, which is apparently inseparable from its existence; and that

[17] Cases 10, 11, 23, 24, 25, 26, 27, 39, and 42.

(*e*) Its use must be limited to very narrow conditions within the careful discretion of the representative of this government,

(*f*) While a refusal to exercise the privilege will never be looked upon with disfavor.

(*g*) No tender of asylum should ever be made in advance of an actual emergency, and

(*h*) Asylum can be granted only in case (1) there is mob violence threatened and imminent, or (2) when the existing government has been overthrown and the local law has given way to license and riot, but no discrimination is to be made in favor of either former or prospective government officials;

(*i*) And it can never be invoked to harbor criminals and offenders against the laws when they are demanded in regular proceedings by proper authorities.

(*j*) Whenever the protection is granted, all munitions of war must be confiscated; the refugees must be kept within the limits of the legation premises; and all communication with outside parties must be strictly prohibited.

This seems to be about as far as it is possible to curtail the "right," or perhaps, until the civilization of the South American countries is farther advanced, about as far as is expedient. Within these narrow limits, if they are strictly adhered to, humanity and wisdom seem to have joined hands, and with a consistent course predicated upon the above gleaned principles, the so-called right of asylum should not in the future be the cause of any serious difficulty, although it is doubtful if it will for many years disappear entirely from the yearly records of the Department of State.

BARRY GILBERT.

THE INTERNATIONAL NAVAL CONFERENCE OF LONDON, 1908–1909 [1]

The cause for the creation of this conference and for its resultant codification of naval prize law can be found in the convention to establish an International Prize Court drawn up and signed at the Second Hague Conference by most of the powers in attendance.

Article 7 of this convention reads as follows:

> If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself, or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.
>
> In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists the court shall give judgment in accordance with the general principles of justice and equity.
>
> The above provisions apply equally to questions relating to the order and mode of proof.

There was and has been considerable delay in obtaining signatures for this convention after it was agreed upon. On January 10, 1908, Germany, Brazil, China, Spain, Great Britain, Italy, Japan, Portugal, Russia, and Turkey among the greater powers had not signed, while practically there had been no ratifications. This delay was due to the vagueness of the article just quoted on the part of the great powers and also to the method of apportionment of representation upon the bench of judges on the part of the smaller powers. The state most concerned in the establishment of this prize court and in the questions of belligerent and neutral rights involved was unquestionably Great Britain, as the possessor not only of the greatest navy in the world, but also of the largest mercantile marine and seaborne trade. So essential is sea power and commerce to Great Britain that without it as a paramount influence she would shrink from a world-wide empire to an unimportant group of islands on the

[1] Declaration is printed in the Supplement to this issue, p. 179.

western face of Europe with detached, heterogeneous and widely separated dependencies.

The Russo-Japanese war had recently made it evident to Great Britain not only how much a neutral trade could suffer and be interfered with vexatiously in a war whose area of operations was far removed from a home country; but also the disadvantages of the trial of her ships as prizes by foreign courts with rules at variance with her own usage and jurisprudence. It had long been well known that many of the continental doctrines of belligerent rights and duties were at variance with her own doctrines and those of the United States and Japan, but it had also become evident to keener minds of these latter countries that much of their own doctrine and practice had become obsolete since the time of the French and more especially the Napoleonic wars.

It was then natural that Great Britain, much as she desired a prize court of impartial bias, hesitated to sign the convention with its governing generalities and vague expressions of benevolent equity. Any court constituted by the convention would have been composed of judges, a large majority of whom would have been appointed by states whose geographical conditions, national interests and traditional doctrines would place them as members of a school opposed to much in theory and practice to that adopted by Great Britain, inherited by the United States of America, and from which Japan had drawn her text books and authorities. As a result of this situation and for the purpose of evolving order out of the chaos, the British government on the 28th of February, 1908, sent a circular note to various powers inviting them to join in a conference, the object of which should be to arrive at an agreement as to what were the generally recognized principles of international law referred to in the second paragraph of article 7 of the prize court convention. It became more and more evident that the greater the uncertainty was the greater and more unlimited became the power of the court, and the more dangerous and unsatisfactory might become its decisions.

In its call for a conference, the government of Great Britain stated, that the rules by which appeals from national prize courts would be decided affected the rights of belligerents in a manner

which would be far more serious to the principal naval powers than to others, and consequently His Majesty's Government at first communicated only with the governments of Austria-Hungary, France, Germany, Italy, Japan, Russia, Spain and the United States of America. To these powers the Netherlands were added as the home of the Hague Conferences and the seat of the proposed international prize court, thus making ten powers in all.

The original proposition named the time of the assembly of the conference as October 1, 1908, with the suggestion that it should meet in London. The time of the meeting was afterwards postponed until the first of December of that year, but the first actual session took place on the fourth of that month at the Foreign Office in London.

The questions which the British Government were particularly anxious to have considered and upon which they were desirous that an understanding should be reached "were those as to which divergent rules and principles have been enforced in the prize courts of different nations. It was therefore suggested that the following questions should constitute the programme of the conference:"

(a) *Contraband*, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy, and the rules with regard to compensation when vessels have been seized but have been found in fact only to be carrying innocent cargo;

(b) *Blockade*, including the questions as to the locality where seizure can be effected, and the notice that is necessary before a ship can be seized;

(c) The doctrine of continuous voyage in respect both of contraband and of blockade;

(d) The legality of the destruction of neutral vessels prior to their condemnation by a prize court;

(e) The rules as to neutral ships or persons rendering "unneutral service" ("assistance hostile");

(f) The legality of the conversion of a merchant vessel into a warship on the high seas;

(g) The rules as to the transfer of merchant vessels from a belligerent to a neutral flag during or in contemplation of hostilities;

(h) The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

The British Government further stated that unless some agreement should be arrived at with respect to most of the topics just mentioned that it would be difficult, if not impossible, for it to carry the legislation necessary to give effect to the convention unless they could assure both houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal should be governed.

In order to expedite matters it was further suggested that on some date prior to the meeting of the conference the participating governments should interchange memoranda setting out concisely what they regarded as the correct rule of international law upon each of the above points, together with the authorities upon which that view was based.

This latter suggestion was duly accepted and the various memoranda with the consequent bases for discussion were prepared and interchanged and finally bound together, forming what was known in the conference as the " Red Book." This volume with its arranged grouping greatly facilitated the work of the conference and contributed to the success of its labors. The matters upon which the Second Hague Conference had come to an agreement, but had not formulated, bearing upon the subjects before the conference were also availed of to further the purposes of our meeting. Especially was this the case in the list of absolute contraband to which the conference always returned as a finality.

It will be seen that the call of the British government excluded various subjects which bore more directly as to the action of one belligerent upon another. As this was not linked with the question of a prize court it leaves still a few unsettled questions to be agreed upon before the complete war code of the sea can be drawn up as a finality.

In the earlier stages of its inception this international conference was known as the " International Maritime Conference," but on the eve of its meeting and before actual assemblage the name was changed by the British Government to that of the " International Naval Conference," and by this name in English and its official title in French " La Conférence Navale de Londres " it is and will be known to the world.

The conference represented ten naval powers and consisted of thirty-seven delegates, thirteen of whom were delegates plenipotentiaries. It was composed of jurists, diplomatists and naval officers. Fourteen of the thirty-seven delegates were naval officers, three of whom headed their delegations as first delegates. Many of the delegates had been members of one or the other of the Hague Peace Conferences, and consequently had both the advantages and disadvantages of being concerned in the discussions and controversies attendant upon these conferences.

The memorandum presented by the United States was referred to in its instructions to its delegation as follows:

> As to the framing of a convention relative to the customs of maritime warfare you are referred to the Naval War Code promulgated in General Orders No. 551 of the Navy Department of June 27, 1900, which has met with general commendation by naval authorities throughout the civilized world and which in general expresses the views of the United States, subject to a few specific amendments suggested in the volume of international discussions of the Naval War College of the year 1903, pages 91 to 97. The order putting this code into force was revoked by the Navy Department in 1904, not because of any change of views as to the rules which it contained, but because many of those rules, being imposed upon the forces of the United States by the order, would have put our naval forces at a disadvantage as against the forces of other powers, upon whom the rules were not binding. The whole discussion of these rules contained in the volume to which I have referred is commended to your careful study.

As to the instructions given by the various governments to their respective delegations I can only quote that of Great Britain as to the general principles for their guidance. It reads as follows:

> In the general conduct of the negotiations your Lordship and the British delegates associated with you will ever bear in mind that the British Empire, like every other state, has, when neutral, everything to gain from an impartial and effective international jurisdiction in matters of prize such as it is the purpose of the forthcoming conference to establish on a sure and solid foundation and that if, unhappily, the Empire should be involved in war, it will not suffer if those legitimate rights of a belligerent state which have been proved in the past to be essential to the successful assertion of British sea power, and to the defence of British independence, are preserved undiminished and placed beyond rightful challenge. The maintenance of these belligerent rights

in their integrity, and the widest possible freedom for neutrals in the unhindered navigation of the seas, are the principles that should remain before your eyes as the double object to be pursued and should at the same time serve as the touchstone by which either the equity of concessions which you may ask other powers to make, or the value of compromises to which you may be called upon to assent, can be safely and accurately judged.

On meeting, the conference was received by Sir Edward Grey, the Secretary of State for Foreign Affairs, and the Earl of Desart, the head of the English delegation, was made president of the conference. M. Louis Renault, the distinguished French jurist and publicist, was designated as chairman of the Conference when in commission and committee, and the French language adopted as the official language of the conference, allowing the mother tongue of the delegates to be used subject to immediate translation. The official text of the declaration and of the proceedings is consequently in the French language.

The sessions of the conference in one form or other continued, with a vacation for the Christmas holidays, until the 26th of February, 1909, when the formulated declaration with the closing protocol was adopted unanimously and signed and sealed and the conference adjourned. The declaration, though agreed to by all, has been signed by the plenipotentiaries of Great Britain, France, Germany, the United States of America, Austria-Hungary and the Netherlands. It is open for signature until June 30 of this year.

The Declaration of the London Conference consists of seventy-one articles in all. Its title is "Declaration Concerning the Laws of Naval War." After a prelude in which a reference — the only one in the declaration — is made to the Hague Convention for the establishment of an international prize court, the preliminary provision states that the signatory powers are agreed that the rules contained in the following chapters "correspond in substance with the generally recognized principles of international law."

Chapter I, which follows, treats of *blockade in time of war*. The articles under this head, twenty-one in number, in the main, codify and crystallize what has been the American practice and jurisprudence with respect to that subject. Article 3, for example, stated

"that the question whether a blockade is effective is a question of fact," while Article 6 recognizes the fact that permission is necessary from the commander of the blockading force when a war vessel — presumably neutral — desires to enter or leave a blockading port.

Article 15 carries with it the renunciation of the continental doctrine of a special notification on the spot for each vessel. This question of notification is contained in the three following articles:

ARTICLE 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

ARTICLE 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

ARTICLE 16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's logbook, and must state the day and hour, and the geographical position of the vessel at the time.

A matter which involved a considerable change was the extreme view contained in the Anglo-American doctrine as to the duration of the liability to capture of a blockade-runner. This liability extended according to that doctrine from departure from a home port or the initial point of voyage until a return to the same point. Not only was this not accepted by continental authorities but modern conditions had made it most annoying and vexatious to any neutral that could be involved in suspicion as to breach of blockade. The practice of attempting to enforce a blockade existing on the costs of North Eastern Asia or South Eastern Africa in the waters of the Mediterranean was not only highly resented by those not holding the Anglo-American doctrine, but it was equally vexatious when applied to English and American vessels either in the Atlantic or Mediterranean. England led off in this question by yielding in the conference as to this doctrine and we were ready to follow if proper restrictions were retained and the military value of a blockade, still one of the most powerful of naval weapons, were not lessened. Our own experience with blockade during the civil war had given us a

remarkable knowledge of its value and scope that practically exceeded all other modern examples. That no blockading vessels for instance might be seen from the blockaded port is not only a condition inherited from our own and the latest wars, but was practiced even so far back as when Nelson lay off Genoa. The whole of this was reversed by the article that made the question of effectiveness a question of fact, not of visibility.

Fortunately a happy solution of the matter of liability to capture was found in prescribing that the pursuit of the blockade runner should begin only within the area of blockading operations and the capture limited to that area or in the course of pursuit initiated within that area. This area in extent is governed by the requirements of the blockade for each place, but must be covered by the presence of a sufficient number of vessels so arranged by the commander of the blockading force as to make the blockade most effective.

The wording of the articles involving these changes is as follows:

ARTICLE 17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.

ARTICLE 18. The blockading forces must not bar access to neutral ports or coasts.

ARTICLE 20. A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

In the general report upon the declaration the following statement as to the extension and elasticity of blockades made by Admiral Le Bris of the French navy met with general approbation:

Cases may occur in which a single ship will be enough to keep a blockade effective — for instance, at the entrance of a port, or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider, and extends further from the coast. It may therefore vary with circumstances, and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

To this statement the American delegation added " that the nature of the area of operations varied with geographical conditions, the proximity of neutral ports and the interests of neutral commerce as well as with the force employed." As an explanation of a great distance that might be required to be covered attention was called to the fact that breach of blockade had become almost entirely a night operation; and the capture of a vessel that had successfully cleared the entrance of the port could best be effected as she emerged at daybreak from the zone of darkness, and here naturally one of the outer lines of a blockading force would be placed. Hence with sixteen hours of darkness and thirty knots speed that might well be 480 miles off.

As to the question of pursuit the American delegation stated that its interpretation of pursuit was that continuous pursuit did not necessarily mean by the same vessel but that it could be started by a vessel from one line, to be taken up in succession by one from another line and so in succession, so as to keep the vessels of the various lines in more or less established position. To this interpretation printed with the proceedings no opposition was offered.

In the general report explanatory of the article it is also stated that the question of abandonment of pursuit is one of fact; seeking refuge from pursuit in a neutral port does not end pursuit when such refuge is sought only for safety from pursuit. The pursuing ship can wait until the departure of the pursued ship so that the pursuit in this case is suspended, but not abandoned. Article 19 exempts a vessel bound for a non-blockaded port from capture for breach of blockade no matter where she or her goods are ultimately bound. This article prevents the application of the doctrine of continuous voyage as to blockade and is a concession upon our part as we were the only power holding to the contrary. This concession was in return for others mentioned elsewhere.

The next chapter of the declaration treats of the subject of *contraband of war,* probably the most important as well as the most difficult of the subjects before the conference. The result, as shown in the twenty-three articles grouped under that head, marks the greatest success of the conference both in a universal sense and in

special application to our own country. The usual distinction is presented in this chapter in the classification of articles of absolute and conditional contraband, lists of which were duly agreed upon and formulated. To these two lists was added a third, liberal and well defined, containing articles which were under no circumstances during the life of the declaration to be considered as contraband.

In the first article of the chapter, numbered as article 22, is contained the list of articles that are to be considered without further notice as absolute contraband. This list is the one agreed upon at the Second Hague Conference by the committee charged with the subject and virtually, but not formally, by the principal powers there represented. Although at least one half of the London Conference were opposed to the inclusion of horses and mules in this list it was deemed wise not to reopen the list and subject it to amendment and discussion. It is also to be observed that while naturally and usually with us, and some other states, horses were considered rather as conditional than absolute contraband, with still other countries all horses and animals of burden in the state are considered as subject to requisition and available for war purposes when the state so willed it. The articles of absolute contraband are:

1. Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
2. Projectiles, charges and cartridges of all kinds and their distinctive component parts.
3. Powder and explosives especially prepared for use in war.
4. Gun mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
5. Clothing and equipment of a distinctively military character.
6. All kinds of harness of a distinctively military character.
7. Saddle, draught and pack animals suitable for use in war.
8. Articles of camp equipment, and their distinctive component parts.
9. Armor plates.
10. War ships, including boats and their distinctive component parts of such a nature that they can only be used in a vessel of war.
11. Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms or war material for use on land or sea.

If in the course of time other articles than those given in this list may be developed for war uses exclusively it is provided that they

may be added to it by a declaration from one or other of the belligerents duly addressed to the other powers.

The second list — of conditional contraband — is of those articles, susceptible of use in war or for peaceable purposes, that are to be treated without further notice as contraband of war when destined for the enemy's forces. This list, contained in article 24, is as follows:

1. Foodstuffs.
2. Forage and grain, suitable for feeding animals.
3. Clothing, fabrics for clothing, and boots and shoes suitable for use in war.
4. Gold or silver in coin or bullion; paper money.
5. Vehicles of all kinds available for use in war and their component parts.
6. Vessels, craft and boats of all kinds; floating docks, parts of docks and their component parts.
7. Railway material, both fixed and rolling stock and material for telegraphs, wireless telegraphs, and telephones.
8. Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.
9. Fuel, lubricants.
10. Powder and explosives not specially prepared for use in war.
11. Barbed wire and implements for fixing and cutting the same.
12. Horseshoes and shoeing materials.
13. Harness and saddlery.
14. Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

In the running commentary of the general report an explanatory statement was agreed upon that *foodstuffs* include products necessary or useful for sustaining man, whether solid or liquid, which would include wines, etc.; and that *paper money* only includes such convertible paper money as bank notes which may or may not be legal tender. Bills of exchange and cheques are excluded. *Engines and boilers* are included with vessels, craft and boats, while *railway material* includes fixtures (rails, bridges, etc.) as well as rolling stock.

The third list, generally known as the free list, is preceded by article 27 which states that articles which are not susceptible of use in war may not be declared contraband of war. It is stated that the following named articles may not be declared contraband of war:

1. Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
2. Oil seeds and nuts; copra.
3. Kubber, resins, gums, and lacs; hops.
4. Raw hides and horns, bones, and ivory.
5. Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
6. Metallic ores.
7. Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
8. Chinaware and glass.
9. Paper and paper-making materials.
10. Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.
11. Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
12. Agricultural, mining, textile, and printing machinery.
13. Precious and semi-precious stones, pearls, mother-of-pearl, and coral.
14. Clocks and watches, other than chronometers.
15. Fashion and fancy goods.
16. Feathers of all kinds, hairs, and bristles.
17. Articles of household furniture and decoration; office furniture and requisites.

Likewise the following may not be treated as contraband of war:

1. Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in article 30 [*i. e.*, to an enemy].
2. Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

A great element in the matter of contraband is the question of destination. This not only makes or unmakes conditional contraband but also brings in the question of continuous voyage, one of the most troublesome of questions connected with contraband and concerning which there was probably the most radical difference of opinion. This matter has been called by the British delegation the British doctrine of continuous voyage; but its use and development during the Civil War has made it more of an American doctrine. Its connection with that war and the subsequent controversy as to the doctrine has gathered around it a great sentimental value not justi-

fied by its practical worth in these later days as a military weapon and regardless of its detrimental character to us as neutral traders and furnishers of foodstuffs when applied to blockade and conditional contraband. Considering these two phases of its use, its sentimental value is somewhat like that of the "blood-stained greenback" when applied to the economics of unlimited paper currency discussions.

Applied to foodstuffs and fuels it is also a matter of great difficulty of enforcement as such cargoes when imported in bulk into neutral countries go at once into the common stock of those countries and are not earmarked for the use of an enemy beyond neutral borders. This difficulty cannot be said with respect to the doctrine of absolute contraband, the character of such warlike stores, for war alone, and for special national service oftener, gives a distinct clue to its destination. As a general compromise upon the subject the doctrine of continuous voyage was accepted for the first time by several nations in connection with absolute contraband, while given up by us and others with respect to blockade and conditional contraband. The free list was also formed and accepted and other concessions added to on both sides as a part of this general compromise.

Articles 33 and 34 discuss and define the destinations which make the article carried conditional contraband. Article 35 was framed to exclude the question of continuous voyage from being applied to conditional contraband. A curious endeavor has been made recently in England to read into this article a doctrine that foodstuffs are to be considered conditional contraband when bound for the enemy country without regard to enemy forces. This would make food contraband if bound to a commercial port for the ordinary civilian population. The wording of the article as shown by the general report was to prevent conditional contraband being liable to capture if bound for other than enemy territory, or in other words preventing the application of continuous voyage to conditional contraband bound to neutral ports. If the country at war, however, has no seaboard, a cargo bound to the enemy forces using an intervening port or seaboard country under article 36 is liable to seizure, as the neutral port of destination in this case is construed to be an enemy port, being the only sea approach existing.

In article 40 a much discussed question was settled as to the liability of the contraband carrier as well as the contraband goods to condemnation. By the law of nations at the close of the 18th century the act of carrying materials of war to a belligerent was regarded as a wrong for which both vessels and cargo were liable to condemnation. Since then the proportionate amount of contraband in the cargo to cause condemnation has varied with different countries, the general idea being that if the contraband part should be sufficiently large to make its carriage a determining factor in the voyage of the ship that its mission should be construed as a hostile venture and distinctively giving forbidden aid to the enemy. In some countries one fourth of the cargo being contraband the ship was considered confiscable. With us the tendency has been to limit the confiscation of the ship to cases where fraud or bad faith on the part of the master or owner was discovered. It was generally claimed, however, and admitted at the conference that in certain cases the confiscation of the contraband and the innocent part of the cargo belonging to the owner of the contraband was not enough. As to what should determine these cases was a matter of much divergence. Finally, it was agreed that the degree of culpability should be judged by the proportionate contraband part of the cargo and that part should be more than one half of the cargo. As to the mode of reckoning, I can do no better than give the words of the distinguished General Reporter, M. Renault. He says:

> Must the contraband form more than half the cargo in volume, weight, value or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods occupying space or weight sufficient to exceed the contraband. A similar remark may be made as regards the standard of value or freight. The consequence is that in order to justify condemnation it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but on the one hand any other system would make fraudulent calculations easy, and on the other, the condemnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture — a statement which applies to all the cases specified.

In article 44 it is provided that a neutral vessel carrying less than half contraband and hence not subject to condemnation may when the circumstances permit be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war vessel, who is at liberty to destroy the contraband thus handed over to him. The master must give the captor duly certified copies of all relevant papers.

This does not go so far as some of our treaties upon the subject; especially one with Prussia, now considered in force by the Empire of Germany. This requires the payment of the market price of contraband goods of the enemy port to which the vessel is bound, to be given for all contraband handed over. The loss by detention, etc., during such a transfer is to be paid also by the belligerent vessel. This treaty virtually creates a trade in contraband for which the belligerent must pay at a fictitious rate.

The next chapter of the declaration is upon the subject of *unneutral service*, and only consists of three articles. This service is classified under two heads; under the first, a neutral vessel will be condemned and will in a general way receive the same treatment as a *neutral* vessel liable to condemnation for carriage of contraband. Under the second head (article 46) a neutral vessel is liable to condemnation and in a general way liable to the same treatment as an *enemy* merchant vessel for certain specific acts of greater gravity and more direct and valuable service to the enemy.

Several propositions were made in the conference to treat as an enemy merchant vessel any neutral vessel engaging with the consent of the government of the enemy in trade forbidden to them in time of peace. This was an attempt to revive the doctrine of the rule of 1756, which would apply directly to our coasting trade and the trade with our insular possessions. To this objection was made formally and informally, and successfully, by the American delegation, and by the countries having a system of "cabotage" in principle not unlike our own. The revival of this doctrine was presented and urged by Great Britain, quoting from some American authorities in favor of its position. The importance of this question to us can be readily seen when we consider the extent of our present coasting

trade on both oceans and the future development likely to follow after the opening of the Panama Canal, as well as the natural increase with time of our trade with our insular possessions in the West Indies and Pacific. The question has been left an unsettled one by the non-action of the conference but should engage the consideration of our government and be met by proper diplomatic negotiations or timely assertion of our position.

Article 47, which states that

> Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel,

was one against which the United States withheld consent until the last moment but was assented to finally by our government as a concession not in accord with our practice, but in order to allow a harmonious conclusion.

We had however with other countries agreed to a convention drawn up at the Second Hague Conference for the adaptation of the principles of the Geneva Convention to maritime warfare to the effect in article 12 " that any warship belonging to a belligerent may demand the surrender of sick, wounded or shipwrecked men on board military hospital ships belonging to relief societies, or to private individuals, *merchant ships,* yachts or boats, whatever the nationality of such vessels." This gave a considerable precedent. In addition the resulting inconvenience was manifest to large passenger liners under merchant flags, with mails, valuable cargoes, and thousands of passengers, if they should be taken into one of the comparatively few suitable ports, subject to detention and great loss for a few persons *forming part of the armed forces of a belligerent,* but travelling incognito as passengers, unknown and unsuspected by the owners, agents or master. Adjudication would doubtless release the vessel as being without conscious guilt. Moore, in his digest, speaking of treaties between the United States and various other countries, says that,

> They clearly exemplify the opinion that the transportation on the high seas of military persons in actual service is an act the consummation of which the adverse belligerent has a right to prevent.

Granting this, the concession of allowing the neutral to prevent without further adjudication under the circumstances above, though an innovation, is, I think, to the advantage of freer trade and any abuse may well be corrected by diplomatic pressure on the part of the neutral against the belligerent whose right of examination and search exists with its consequent responsibility as a war right.

The next chapter of the declaration is devoted to the subject of the *destruction of neutral prizes*. This question, judging from the controversial experience at The Hague, was one upon which little agreement was hoped for. The divergence between the Anglo-American and Continental schools seemed hopeless, but at London, on account of that very previous divergence, the subject was approached on both sides with moderation and concession. The continental powers submitted authorities and precedents in American history showing that we favored or permitted such action. Considering that our war code was part of our instructions and recognizing the possibility under certain circumstances of such destruction our delegation did not advocate the extreme stand taken at The Hague, especially as our own State Department in the "Knight Commander" case had further expressed itself as not being prepared to say that under certain circumstances neutral prizes could not be destroyed. The American delegation took the ground, however, that only under circumstances of great military necessity or in cases of self preservation should such action be taken. This stand was also taken by them because rigid rules forbidding such destruction might be violated by urgent necessity. England followed in the main supporting this position, and the compromise was soon arranged in committee by which only vessels that came within the limits of confiscation should be so destroyed. These articles read as follows:

ARTICLE 48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

ARTICLE 49. As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

ARTICLE 50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

ARTICLE 51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

ARTICLE 52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested in place of the restitution to which they would have been entitled.

In article 54 the doctrine is established that if a vessel should have less than half the cargo contraband under the circumstances just stated involving danger to the safety of the ship or to the operations immediately engaged the captor could destroy the contraband while releasing the vessel. This is in logical sequence of article 48.

The next chapter treats of the *transfer of an enemy vessel to a neutral* during or before hostilities. The opposition of our delegation prevented the adoption of an unlimited period before hostilities in which this transfer was virtually made invalid or doubtful.

The succeeding chapter is upon the subject of *neutral or enemy character*. Upon the question of the vessel an agreement was readily reached, making the flag carried the test of character. Upon the subject of the goods the old question of the domicile or the nationality of the owner came to the front and the first vote showed an equal division of the powers. Afterwards all of the delegations except practically our own, considering it better to have it settled either one way or the other rather than to leave it unsettled, ranged themselves on the side of nationality, but as our government was not prepared to give up domicile as a test no agreement was reached and the question remains open.

Upon the question of *exemption from search under convoy, resistance to search*, and *compensation*, the formulating of the articles was in accord with the general principles and usages held by ourselves in the past. An attempt to require a dual visit of vessels under convoy

and to arrange for a divided responsibility as to giving up protection of convoyed vessels was strongly and successfully resisted by the American delegation.

The conditions under which merchant vessels may be converted into war vessels in war time was the subject of much debate resulting in no agreement at the Second Conference at the Hague, and the same result obtained at this conference. Whether it is to the interest of the United States to advocate such transformation upon the high seas is a debatable one; at the Hague it was feared complications would arise if such were permitted. As it was there were in London other claims urged that made the matter more difficult of solution. They were the right to transform in neutral ports, for transformation without notification and for re-transformation during the war. The American delegation took a stand against the transformation in neutral ports or on the high seas and the whole matter was given up as incapable of solution.

This finishes the declaration proper which has an initial life of twelve years renewable for periods of six years each. So far as can be learned up to the present moment this declaration has received almost general commendation.

In considering as a whole this declaration it is desirable to call attention to the fact that for the first time in history the great sea powers — and consequently the great powers of the world — have agreed upon a code formulated with very considerable detail and precision, which settles many disputed questions of maritime warfare. Every one of the articles applies to neutrals as well as to belligerents in some phase or other. The greater part of the signatory powers, original and adherent, will be neutrals in any war likely to arise and such a weight of neutral power will compel an adherence to the declaration on the part of the signatory belligerents. In war time belligerents are very susceptible to such influence and naturally do not desire additional complications from neutral powers. Hence the enforcement does not require creation of additional force for police; the forces are ready and impelled by their own commercial interests. So much for the future recognition of its obligations. As for its provisions for defined contraband and free lists, for the limitation of

area of capture in blockading operations, for limitation of confiscation of vessels as carriers of contraband, for the release and continuance on their course of vessels with small amounts of contraband, for the restriction of the destruction of neutral prizes to cases of urgent necessity, for the differentiating in cases of unneutral service, and for compulsory compensation in many additional cases, it has by their adoption relieved neutral cargoes and vessels from many vexatious uncertainties and neutral trade from many fetters without sacrificing any necessary belligerent rights in time of war.

One matter remains to be discussed. It was considered at the Second Hague Conference of 1907 that the convention for the establishment of the international prize court did not conflict with constitutional law and so the treaty was signed. Before the ratification was proposed, however, doubts arose whether the articles providing for the judiciary of the United States in the Constitution allowed the establishment of a court of appeals beyond the Supreme Court of the United States, our final national court, and the compulsion of that court to subject its record to such court of appeals. To meet such a constitutional objection before it was too late it was proposed by our government that the Hague Convention should have added to it by and through the London Naval Conference and its declaration or convention a new procedure by which cases from the United States court or courts should be submitted to the international court for rehearing as cases *de novo,* instead of by appeal, the parties abiding by the decisions of the international court and its findings to be observed as if it were of the originally prescribed procedure. To this proposition was added at a later period of the session of the conference another one proposing that the international prize court should have the functions and follow the procedure of the arbitral court proposed in the draft of a convention relative to an arbitral court which was annexed to a wish (*voeu*) to the Final Act of the Hague Conference of 1907.

This proposition of the government of the United States was vigorously presented by the American delegation and discussed in and out of the conference and committee. As a result a final protocol was prepared and signed by all of the plenipotentiaries present, and by

the delegates representing those plenipotentiaries who had left London, which contained the following wish or *voeu:*

The delegates of the powers represented at the Naval Conference which have signed or expressed the intention of signing the convention of the Hague of the 18th of October, 1907, for the establishment of an International Prize Court, having regard to the difficulties of a constitutional nature which in some states, stand in the way of the ratification of that convention in its present form, agree to call the attention of their respective governments to the advantage of concluding an arrangement under which such states would have the power at the time of depositing their ratification, to add thereto a reservation to the effect that resort to the International Prize Court in respect of decisions of their National Tribunals shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said convention either to individuals or to their governments and that the terms of the reservation shall form the subject of a subsequent understanding between the powers signatory of that convention.

In a report made upon the conference by the British Delegates, the subject of these propositions was thus discussed which gave reasons for the action of the conference with respect to the propositions offered by the American government and delegation:

It remains for us to speak of a matter with which, although not within the provinces of its programme, the Conference was called upon to deal in consequence of a proposal submitted at a late stage of its proceedings by the United States delegation. The proposal, * * * was intended to smooth the way for the ratification of the Prize Court Convention by the United States, whose constitution appears to place insurmountable obstacles in the way of the acceptance of the procedure governing the recourse to the International Court as laid down in that convention. In order to overcome the difficulty which, it was explained, precluded any right of appeal being allowed from a decision of the United States' Supreme Court, the Conference was asked to express its acceptance of the principle that, as regards countries in which such constitutional difficulty arose, all proceedings in the International Prize Court should be treated as a rehearing of the case *de novo*, in the form of an action for compensation, whereby the validity of the judgments of the national courts would remain unaffected, whilst the duty of carrying out a decision of the international court ordering the payment of compensation would fall upon the government concerned.

The proposal was further coupled with the suggestion that the jurisdiction of the International Prize Court might be extended, by agreement between two or more of the signatory powers, to cover cases at

present excluded from its jurisdiction by the express terms of the Prize Court Convention, and that in the hearing of such cases that court should have the functions, and follow the procedure, laid down in the Draft Convention relative to the creation of a Judicial Arbitration Court, which was annexed to the Final Act of the second Peace Conference of 1907.

Great hesitation was felt in approaching these questions. It was undeniable that they lay wholly outside the programme which the Conference had been invited to discuss, and to which the powers accepting the invitation had expressly assented. It was, however, not disputed that so much of the United States' proposal as related to the difficulties in the way of the ratification of the Prize Court Convention was in so far germane to the labours of the Conference, as these also were avowedly directed to preparing the way for the more general acceptance of the Prize Court Convention. As it must clearly be desired by all countries interested in the establishment of the International Prize Court that the United States should be one of the powers submitting to its jurisdiction and bound by its decisions, the Conference thought it right, notwithstanding its lack of formal authority, to go so far as to express the wish ("vœu") which stands recorded in the final protocol of its proceedings, and of which the substance is that the attention of the various governments represented is called by their delegates to the desirability of allowing such countries as are precluded by the terms of their constitution from ratifying the Prize Court Convention in its present form, to do so with a reservation in the sense of the first part of the United States' proposal.

On the other hand, the question of setting up the Judicial Arbitration Court, which seemed to have no necessary connexion with the Prize Court Convention, was decided by all the delegations, except that which had brought it forward, to be one which the Conference could not discuss. It was observed with conclusive force that the Conference was attended by delegates of the principal naval powers, whose unanimous agreement on questions of naval warfare might not unreasonably be expected to carry weight with other states, but which had neither formal nor moral authority for taking up a scheme that had failed to find general acceptance at The Hague owing to the decided opposition of the very powers not represented at the present Naval Conference.

It is well to add here that, largely through the endeavors of the American delegation, the adopted declaration stands by itself as a finished convention and does not depend for its future existence upon the ratification of the convention to establish the International Prize Court. This method of formulation was in accord with our instructions.

Articles 65 and 66 emphasize this independence and read as follows:

ARTICLE 65. The provisions of the present Declaration must be treated as a whole, and can not be separated.

ARTICLE 66. The signatory powers undertake to insure the mutual observance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.

In closing I cannot do better than repeat the quotation made by the Earl of Desart at our final meeting from the remarks of Sir Edward Fry in the closing days of the Second Hague Conference. Sir Edward said:

I have not the intention to pass in review the works of this Conference. I will confine myself to make the remark, that, of all the projects that we have adopted the most remarkable, to my view, is that of the Court of Prizes, because it is the first time in the history of the world that there has been organized a court truly international. International law of today, is not much more than a chaos of opinions which are often contradictory, and of decisions of national courts based upon national laws. We hope to see little by little formed in the future, around this court, a system of laws truly international which will owe its existence only to principles of justice and equity, and which consequently will not only command the admiration of the world, but the respect and obedience of civilized nations.

The Declaration of London, 1909, is the first result of those expected by Sir Edward Fry from the Prize Court Convention of 1907, and I hope it will be found to meet the standards desired by this revered English jurist.

C. H. STOCKTON.

THE MOST-FAVORED-NATION CLAUSE *

Interpretation

Before turning to consider the views of several of the leading writers who have discussed the theory and practice of the most-favored-nation clause, it will be well to get clearly in mind certain circumstances which have attended its use in different periods. A knowledge of the time when a treaty was made will be found to be absolutely essential in many cases if we wish to arrive at a proper interpretation of some of its clauses.[62]

In the first place, and of primary importance, most-favored-nation treatment has now, and had in the eighteenth century, a different meaning in European policy from that which attached to it between 1825 and 1860. While European countries now give the clause a form and an interpretation corresponding approximately to that in vogue in the eighteenth century, the universalizing of favors, which, through the intricacy of modern treaty systems, that old form might be expected to entail, is largely modified by the mechanism of modern tariff policy.

We have already indicated that the eighteenth century was that of the unconditional clause, and we have noted that the United States in 1778 entered the arena of world-commerce with the principle of opening her ports and guaranteeing equal treatment to all comers — upon a basis of reciprocity. This policy, which did not preclude the granting of special privileges, was clearly a policy of *do ut des,* and it was indicated that it was such by the use of the conditional form of the clauses. Among the states which made use of the clause in that century, Great Britain lead in the number of favored-nation treaties, while the United States came second.

* Continued from the April Number, pp. 395–422.

62 For an exhaustive study from this point of view, Dr. Glier's Die Meistbeguenstigungsklausel is invaluable.

In the first quarter of the nineteenth century the tide set strongly toward the general adoption of a policy of freedom of commerce. At the same time the American principle of "compensations" was written into a widening circle of treaties wherein this extension of commercial privileges was regulated on a basis of reciprocity. The unconditional form of the most-favored-nation clause began to be superseded by the conditional. The first treaty between European states in which there appeared the form originated by the United States was that between Great Britain and Portugal, Feb. 19, 1810. In this treaty, article II, we find the guarantee that any favor, etc., granted by either of the contracting parties to a third nation shall be accorded to the other

> gratuitously if the concession in favor of that other state shall have been gratuitous, and on giving, *quam proxime,* the same compensation or equivalent, in case the concession shall have been conditional.

In 1824 the United States made a treaty with Colombia which marks the introduction of the clause to South American practice. This was followed in 1825 by a similar treaty of the United States with the Central American Confederation, — and thenceforth for twenty-five years South and Central American treaties regularly contained the conditional form.

Of the important treaties made between 1826 and 1830, numbering about a score, only about one-fourth contain the unconditional form of the clause. Among others containing the conditional form, on the basis of reciprocity, we find treaties between: the United States and Denmark, April 26, 1826; the Hanse Cities, Nov. 27, 1827; Prussia, May 1, 1828; Brazil, Dec. 12, 1828; Austria, Aug. 27, 1829; Brazil and the Hanse Cities, Nov. 27, 1827; Prussia, April 18, 1828; Colombia and the Netherlands, May 1, 1829. Five of these were still in force at the end of the century.

Although the point of the wedge had entered, European countries still held in their treaties *inter se* to the unconditional form of the clause until about 1830. Then, as international trade was rapidly increasing, and as the influence of American commercial practice began to be felt, the principle of reciprocity was eagerly seized upon

in Europe, and a whole series of treaties upon this basis ensued. The period from 1830 to 1859 was outspokenly a reciprocity period. In treaties the unconditional form of the most-favored-nation clause appeared more and more rarely, and where it did appear its guarantee was usually only unilateral. England forms somewhat of an exception. She was conservative, and her treaties exhibit a tendency to retain the unconditional clause, while some of the northern states also held to that form. But even England did not abstain altogether from the use of the conditional. We have cited the treaty of 1810 with Portugal. To this may be added a treaty of July 3, 1838, with Austria, in which, article XI, we find

> et leurs majestés * * * s'engagent réciproquement á n'accorder aucunes faveurs, privelèges [etc. to a third state] qui ne soient en même temps accordés [to the co-contractant] gratuitement, si la concession * * * a été gratuite, ou en donnant, en autant qu'il sera possible, le même équivalent, dans le cas ou la concession aura conditionelle.

In January, 1843, Great Britain made a treaty with Russia containing the same formula. The treaty with Liberia, Nov. 21, 1848,[63] contained the conditional form, and the same appears in treaties which Great Britain made between 1849 and 1853 with Costa Rica, Dominica, Peru, Hawaii, Sardinia, Ecuador, and Paraguay.

An examination of the treaties made in this period by Austria, Belgium, France, Holland, Portugal, Sardinia, Sicily, Spain, and the Zollverein, as well as those already mentioned, shows a large return of clauses in the conditional form with the definite stipulation that compensation must be made for privileges demanded. Moreover, an examination of commercial and tariff history shows that reciprocity was the guiding principle in the commercial relations of all western nations from 1825 and 1860. Dr. Glier exhibits thirty-eight treaties of the German states alone in which, of twenty-one made with American states all use the conditional form, while the seventeen with European states almost without exception stipulated in one form or another for the conditional treatment.[64]

[63] See p. 417.

[64] " Hunderte von Vertraegen sind abgeschlossen worden, in denen der Mitgenuss der an dritte Staaten gewaehrten Verguenstigungen von einer Gegenleistung

It should be kept in mind that where most-favored-nation treatment is promised the guarantee usually occurs in double form, representing both the positive and the negative sides, the latter usually preceding the former. Upon the negative side it is promised that "no higher duties shall be imposed upon the products of either party in the territories of the other than are payable upon like products of any other foreign land." But this must be read in connection with the statement of the positive side which accompanies it; if either party makes special concessions to a third, the other shall be accorded the same — but (when the conditional form of the clause is used) only upon offering an equivalent for the compensation which was made by the third, in case there was a compensation. This qualifying clause appears in most of the treaties of the period under discussion. Furthermore, certain treaties which at first sight appear to have been unconditional, are found upon examination to have been modified and made conditional by supplementary conventions.[65] There are still a goodly number of treaties of that period in force, not American alone, but many European as well.[66]

While reciprocity was unquestionably in the ascendant, and while the conditional clause was generally adopted it would be wrong to infer that the unconditional form went entirely out of use. Most of the important states adopted, and made their treaties according to, the prevailing principle, yet the retention of the unconditional form of the favored-nation clause in many English treaties and in those of the northern states is not to be overlooked, while in the fifties we find this form reappearing in certain treaties of south-central Europe.[67] In 1850 Cavour began in Sardinia a commercial policy which led

abhaengig gemacht war. Dies war von 1825–1860 weitaus die Regel." Glier, 16. In this period, "In erster Linie waren es in Europa die heute im Deutschen Reich geeinten Staaten welche den Reziprocitaetsgedanken pflegten. * * *" Glier, 123.

[65] e. g. Treaty between France and Liberia, April 17, 1852, supplemented by an agreement, April 21. See other French treaties.

[66] United States' treaties of that period still in force include those with Argentina, Austria, Bolivia, Colombia, Costa Rica, Denmark, Great Britain, Norway, Persia, Russia, Siam, Sweden, Turkey, and Zanzibar.

[67] Examples: Great Britain–Holland, Oct. 27, 1837; Sardinia–Switzerland, June 8, 1851; Zollverein–Austria, Feb. 19, 1853.

within the next two years to the making of eight treaties in which, in addition to the most-favored-nation clause, the important feature was that tariff reductions to be made were specified. These were, then, tariff treaties, which may be remembered when we think of the prominent place treaties of that form have been given among the commercial instruments of the countries of Middle Europe in the last fifteen years. Belgium, Holland, and Sicily at once followed the example of Sardinia in the use of the tariff-treaty.

Between 1850 and 1865 the tariff policy of Europe underwent a complete transformation. In spite of the influence of such economists as List and Carey, protectionist principles and traditions were completely abandoned. The turning point is usually dated at the Cobden treaty between England and France, Jan. 23, 1860. There were precedents for this treaty in those of Great Britain with Sicily, April 29, 1845; the Sardinian treaties with Belgium, Switzerland, and Austria, 1851, and the Belgian treaty with Holland, Sept. 20, 1851. In a treaty which Russia made with France, June 2–14, 1857, we find most-favored-nation treatment in a conditional clause (article XIV); but in the treaty which Russia concluded with Great Britain, Jan. 12, 1859, the clause appears (article X) in the unconditional form. This treaty contains no hint of the compensation principle. Yet Russia was an outspoken reciprocity state. The inference as regards the British attitude and influence is obvious.

In the Cobden treaty, article XIX, each of the high contracting parties agrees to give the other every favor, etc., on the articles "mentioned in the present treaty" which it may grant to any third power. This partial statement was supplemented by the *real* and extensive most-favored-nation clause which appeared in the complementary convention of Nov. 16, 1860, in which article V reads:

> Each of the High Contracting Powers engages to extend to the other any favor, any privilege or diminution of tariff which either of them may grant to a third Power in regard to the importation of goods *whether mentioned or not mentioned in the treaty of 23rd of Jan. 1860.*

No suggestion is made of any compensation.

England was not alone in abandoning the old, and setting the seal of approval upon the new, commercial policy. European nations

turned enthusiastically toward the idea of removing the artificial restrictions by which their commercial intercourse was regulated. The most-favored-nation clause could be, it was seen, a most efficient instrument in promoting the desired end. As a simple distributive instrument, it would operate, in the unconditional form, by automatically extending whatever concessions might be made to one to other nations, to break down tariff walls gradually and without shock. Immediately all Europe set to remaking treaties, taking as a model for the new agreements the Cobden treaty. The chief characteristic of the new treaties was the insertion of the most-favored-nation clause, without exception, and in the unconditional form. The treaties were shorter than had previously been the rule, and their provisions were limited more strictly to the economic phases of commercial relations. We have mentioned elsewhere the English treaties which followed the Cobden treaty. Belgium at once made treaties (between 1860 and 1870) with France, Great Britain, Switzerland, Italy, Lubeck, Holland, Hamburg, Denmark, Norway-Sweden, the Zollverein, Austria, and Spain. Dr. Glier says of Belgium that it was the most determined champion of the general and unconditional most-favored-nation treatment in all Europe. Italy was also enthusiastic, making treaties in the decade after 1860 with Sweden, France, Great Britain, the Zollverein, Austria, Switzerland, and Spain. France made treaties with Belgium, Italy, the Zollverein, Spain, Austria, and Portugal. How the other nations of Europe followed suit may be seen by observing their names in the above groups.

Thus in the free-trade movement we find the use of the conditional clause entirely given up. When the leading states of the Continent subsequently returned, after 1875, to the principles and practice of protection no return was made to the conditional clause in the treaties. That this return did not take place can probably best be explained by the fact of the adoption of " maximum and minimum " and " conventional " tariff systems, and the correlated use of the tariff-treaty. However that may be, Europe may be said to have definitely given up the conditional form of the clause in 1860, and since then, in spite of inconveniences which have been felt, European states have consistently employed the unconditional form and insisted upon the

unconditional construction. They hold that all favors extended to third states are due at once and without return to states having favored-nation relations with the grantor state. It remains to be considered to what extent and with what modifications the first point may be accepted. With regard to the second, it must be conceded for the majority of European treaties which have been made since 1860. But a great mistake has been made by many governments and by many writers in that they have overlooked the historical setting which is essential, and, ignoring this, have attempted to extend what is a legitimate interpretation of a certain large group of treaties and make that interpretation apply alike and at large to most-favored-nation treaties in general.

While European practice changed in the manner indicated, first from the unconditional to the conditional, and then back to the uniform use of the unconditional, the United States maintained throughout the form and construction of the conditional. South and Central American practice has varied. In some of the early South American treaties the unconditional form was used. Treaties of Brazil and others appear before 1827 in which only the negative side of favored-nation treatment was specified. Treaties made by the United States with Colombia, 1824, and with the Central American Confederation, Brazil, and Mexico in 1825, 1828, and 1832, contained the conditional form, and from then on the leading American states embraced this principle. Their treaties with the United States have regularly contained this form. And between 1830 and 1860 they made no exception to this principle in their dealings with European states. Reciprocity was at the basis of their commercial policies. Their guarantee that "no higher or other duties" would be charged applied, as it has done in treaties of the United States, to the general tariff. For special concessions, equivalents were demanded in return. Since 1860 South American practice represents a tendency to waver between the two forms, in the way characteristic of European practice in the period preceding. Numerous treaties of Venezuela, Argentina, Paraguay, Uruguay, and Peru with European countries contain the unconditional form. This may be readily accounted for by the policies of the latter. Mexico has

used chiefly the unconditional form of the clause. The practice of reciprocity has, however, held firmly in the treaties of American states *inter se*, and in a majority of those made with European, Asiatic, and African states.

Japanese practice, since Japan assumed a position of equality with western treaty-making nations, has varied. The Japanese have been accused of adopting that interpretation which seemed expedient, now giving favored-nation guarantees a qualified meaning and again calling for the unconditional construction. Considering the fact that Japanese treaties have contained both forms of the clause it is difficult to see how they could do otherwise in the matter of interpretation. The Japanese treaty with Denmark, Oct. 19, 1895, article XIV, contains the words "immediately and unconditionally." The same form occurs in treaties made in 1896 with Germany, April 4; Belgium, June 22; Holland, Sept. 8, and Switzerland, Nov. 10. At the same time the conditional form appears in treaties made just previously, with the United States, Nov. 22, 1894; with Peru, March 20, 1895, and with Brazil, Nov. 5, 1895. The fact that these two different forms were used by Japan would seem to indicate one of two things: either the parties with whom the Japanese were negotiating in each instance dictated the form in which the clause should be written into the treaty, using of course that which was common to their own practice, without its being pointed out to the Japanese or without their being aware that there existed a difference in interpretation — a thing altogether unlikely; or, the Japanese, recognizing the distinction, knowingly adopted the one form with some and the other with other nations, and have subsequently, quite logically and discriminatingly, used one interpretation in dealing with one set of nations and another in dealing with the rest. In either case, the fact that they have recognized the difference and acted accordingly, makes the charge that they have now one and now another interpretation assume the nature of a compliment to their clearness of vision. Their action is to be condemned only if instances can be shown in which they have varied in the interpretation of a single form of the clause, to their own advantage.

To summarize: The United States, both as regards form and

interpretation, has been a regular adherent of the conditional usage, with a few exceptions. Great Britain has regularly adhered to the unconditional, with, likewise, a few exceptions. The countries of Europe followed first the unconditional, then the conditional, and then again the unconditional. Those countries which have had commercial policies smacking of free trade have shown a preference throughout for the unconditional, while those countries which have been most consistently protectionist, like Russia, have favored the conditional. South American states have used first the unconditional, then the conditional, and then both. Japan has used both, the choice being determined by the usage of the country with which she was in each case contracting. Other Asiatic countries, and Turkey among European nations, have so far had acquaintance chiefly with the unilateral, and therefore, unconditional, form, with the advantages in the favor of the other party. Two facts stand out prominently: first, that various periods have witnessed a decided shifting of emphasis in commercial policy; second, that favored-nation usage has varied with some, and remained practically constant with other, nations. A third fact of striking importance is, that with all the changing in tariff policy and treaty form, the most-favored-nation clause has not only not lost ground, but it has steadily become a more and more regular feature of commercial treaties. In the latest extensive treaty-making movement, that which busied the countries of central Europe after the passing of the German Tariff Act in 1902, the clause was inserted in every one of the new agreements. At the beginning of 1908, Great Britain had most-favored agreements with no less than forty-six countries, the clause appeared in forty-five treaties of Italy, the United States and Germany had favored-nation treaties with more than thirty countries each, Spain, France, and Japan with between twenty and thirty each, and several other countries were not far behind.

With the most-favored-nation clause occurring so universally, inserted under widely differing conditions, in a variety of forms, and in a veritable network of treaties — and while so great importance has attached to tariff systems and their administration, it is not surprising that problems of interpretation have been both numerous and

complex. Two schools of interpretation have arisen as indicated in the paragraphs introductory to the history of the clause. The adherents of one school hold to the strict or literal, perhaps the more truly juristic interpretation; those of the other insist upon the practical, or — as it seems to some — opportunist, but surely more truly economic, interpretation. The former school, consisting of nations which lean toward the use of the simple reciprocal form of the clause, refuses to admit the distinction which the latter — as represented by the United States — maintains between favors *granted gratuitously* and advantages given expressly *in return for some compensation.*

The interpretation of the clause must necessarily depend to a considerable extent upon the form in which it appears. This suggests that, while emphasizing the importance of the historical survey in attempting to determine the meaning of a given clause, the value of the inductive method is not to be ignored. Our examination at this point requires using both. The *unilateral,* and the *specialized reciprocal,* forms (I and II) [68] offer little ground for misinterpretation, and need not detain us here. Much of the controversy has centered about the *simple reciprocal* form (III) in which the high contracting parties agree that in all that concerns navigation and commerce, favors which either grants to any third state shall be granted to the co-contractant. In the controversy are also involved the *imperative and unconditional* (IV) and the *conditional or qualified reciprocal* (V) forms. Form IV adds to the guarantee carried in form III that favors granted to a third party shall "immediately and unconditionally" be extended to the co-contractant. Form V adds that the favor is to be extended to the co-contractant "freely if the concession to the third party was freely made, or for the like or an equivalent compensation if the grant was conditional."

Now, does form III imply that favors granted to a third party shall be extended *at once* and *without compensation* to the second? Looking at the wording of form III alone it might seem that the favored nation has the right to demand at once the concessions made to the third. But, we notice, form IV contains the word "immediately," which is lacking in form III. We notice likewise that

[68] *Cf.* classification *supra,* pp. 403–405.

form V contains an express stipulation for a "compensation," while form III contains no such stipulation. Is III then to be assumed to be "unconditional?" Here again, turning to form IV, we find the word "unconditionally." This word does not appear in form III. Are we then to assume from this that form III is conditional, in antithesis to form IV, or are we to hold it unconditional, in antithesis to form V? There is one escape from the difficulty here presented: we may assume that since form IV makes no condition it is unconditional, and from that we will be led to the conclusion that the word "unconditionally" is inserted in form IV as a matter of extra caution and for the sake of clearness. Shall we then accept the same reasoning with regard to the word "immediately," giving forms III and IV essentially the same meaning? It is obvious that the mere discussion of terms will not carry us to a conclusion.

Turning to the history of the clause and to the early assertions which were made concerning its character and purpose, we find that its original function was not to secure advantages but to insure against discrimination, and we find special emphasis laid upon the fact that it operated to abolish, instead of creating, inequalities (which must include advantages as well as disadvantages) in the world's markets.[69]

Mr. Herod's "Most-Favored-Nation Treatment" contains an excellent discussion of the simple reciprocal form, and of the imperative and unconditional form, applying Hall's rules for the interpretation of treaties.

3. When the words of a treaty fail to yield a plain and reasonable sense, they should be interpreted in such of the following ways as may be appropriate:

a. By recourse to the general sense and spirit of the treaty as shown by the context of the incomplete, ambiguous, or obscure passages, or by the provisions of the instrument as a whole.

[69] "Nur auf die Gleichstellung mit den anderen fremden Staaten, nicht auf die Besserstellung gab die Meistbeguenstigungsklausel ein Anrecht." Kaufmann, *op. cit.*, 342. "* * * cette clause, dont l'effet est de 'généraliser immédiatement chacune des concessions du tarif conventionnel' soit un acheminement, vers le régime du libre échange absolu pour qu-elle soit approuvée par les amis de la liberté." Pradier-Fodéré, Traité de droit international public, IV, 399. *Cf.* Visser, *op. cit.*, 78; von Melle, *op. cit.*, 207; Herod, *op. cit.*, 15–16, and note; Cavaretta, *op. cit.*, 93; Fontana-Russo, Trattato di Politica Commerciale, 593.

b. By taking a reasonable instead of the literal sense of the word when the two senses do not agree.

4. Whenever, or in so far as, a state does not contract itself out of its fundamental legal rights by express language, a treaty must be so construed as to give effect to those rights.[70]

We may well exhibit with these the following from among the rules which Wharton gives for the interpretation of treaties:

(6) * * * "interpretation" gives the meaning of particular terms to be explained by local circumstances and by the idioms which the framers of the treaty had in mind. (7) If two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it.[71]

Mr. Herod argues as follows: examining the treaties containing the simple reciprocal form of the clause, we find that reciprocity is the foundation of all.[72] This being the case, it is natural to infer that reciprocity should be considered as the "foundation for the general covering clause which is to supply omissions and prevent future unfavorable discriminations. This inference becomes a certainty when examined in the light of [Hall's] rule 4. A literal interpretation of the clauses would deprive a state bound by it of one of its important attributes of sovereignty," that is, it would become a bar to the state's making further arrangements upon terms of reciprocity with other nations. Such restrictions only follow upon the consent of a nation itself. Only the insertion of the words "immediately and unconditionally" or their equivalents can justify the assumption that a nation has so bound itself. "The stipulations of conventions governing commercial relations of nations are based upon utility and reciprocity. Gratuitous concessions, taken in a literal sense, are unknown."[73]

[70] Hall, International Law, 5th Edition, pp. 338–339.

[71] Wharton, International Law Digest, § 133, II, 36, citing other authorities.

[72] "La réciprocité du traitement national et des avantages échangés est sans doute la base habituelle de cette sorte de traités; néanmoins on pourrait en citer dans lesquels les avantages respectivement stipulés sont loin de former un équivalent exact." Calvo, Droit International (Ed. 1896), Tome III, pp. 365–366.

[73] Herod, *op. cit.*, 9–12. See Am. State Papers, F. R., V, 152, 890; I, 37; Whitney *v.* Robertson, 124 U. S. 190; 16 Op. Atty. Gen'l, 628.

With regard to the immediate and unconditional form of the clause Mr. Herod says:

> It has been urged that the phrase "shall immediately be enjoyed" places the clause in the category of the imperative form, and secures any favor whatever in the subjects of which it treats gratuitously and without condition. Unless supported by some other strong evidence, the claim cannot be sustained. "Immediately" refers to the self-executing nature of the clause and not to the conditions of enjoyment.
>
> The clause embodying the phrase "without any consultation or delay" lies in the doubtful ground between the simple reciprocal and the imperative form.
>
> To secure beyond question the interpretation of an imperative and unconditional clause, it is essential that it contain the words "unconditionally," "without equivalents," or the like.[74]

In the light of our survey of favored-nation practice, certain qualifications may be suggested to some of these points. It is true that the principle of reciprocity is the foundation of commercial treaties, in that each party to a treaty aims to *get* for that which it *gives*. But the transaction may involve past, present, or future favors. Agreeing in the inference that reciprocity should be considered as the "foundation for the covering clause," it is still possible that if the treaty be regarded as a whole, the clause may be looked upon as guaranteeing an additional return, to whichever party may happen to profit by it, for the concessions which it has made in the text of the treaty. The giving of concession for concession, in the future, may or may not have been implied, according to the policy of the contracting parties. A literal interpretation becomes a bar to the making of further treaties upon a basis of reciprocity only in case the state bound is unwilling to generalize concessions made in subsequent treaties. Some states have avowedly and consistently opposed this practice, some followed a policy of making common to others the concessions which they make to one. Some states have done now the one and now the other. Mr. Herod's statement holds good for countries with a practice similar to that of the United States, but not for one in the position of Great Britain. Further, we see how that generalizing process is not only possible but highly practicable among states which

[74] Herod, *op. cit.*, 28–30.

have adopted the "conventional" tariff system, for there it is by means of this generalizing wrought by the most-favored-nation clause that the conventional schedule is made up. Again, the necessity for considering in what period a treaty was made becomes apparent. Without having done this, unconditional treatment may be read into a treaty which was really made under circumstances which warrant the assumption that conditional was meant. It has been the tendency of late years for countries which formerly used the simple reciprocal form and which are avowed advocates of the unconditional interpretation to employ the fuller and more explicit form, IV, calling for the "immediate and unconditional" grant. This need not imply that their earlier treaties meant less than that, and it is reasonable to make the assumption suggested about that this form is now used for extra caution. Yet we may well agree with Mr. Herod that "to secure *beyond question* the interpretation of an imperative and unconditional clause" this form should be used.

Nearly all writers discuss the question whether the provision of the most-favored-nation clause ought to include merely relations existing at the time of the conclusion of the treaty or ought to secure to the most-favored-nation a treatment equal to that of the nation at each and any moment the most favored, that is, whether the clause extends to favors granted in the future. Von Melle adopts the latter interpretation as essential.[75] Sig. Cavaretta cites De Cusey, Fiore, Heilborn, Ullmann, and de Martens as agreeing with Von Melle.[76] M. Visser defends that position vigorously. On the

[75] "Die an sich moegliche Bestimmung, dass der andere Contrahent nur diejenigen Rechte haben solle, welche zur Zeit des Vertragsabschlusses der Meistbeguenstigten Nation zustehen, scheint thatsaechlich nicht vorzukommen und wuerde auch nicht unter den Begriff der Meistbeguenstigungsclausel fallen. Fuer Letzere naemlich ist wesentlich, dass der durch sie Beguenstigte zu jedem Zeitpunkt der Vertragsdauer mit der dann am meisten beguenstigten Nation gleichgestellt ist. In manchen Vertraegen ist ausdruecklich gesagt, dass das stipulirte Recht der Meistbeguenstigung sich auf die Zukunft beziehen solle. Notwendig aber ist solcher Hinweis nicht, denn auch die ohne Zusatz vereinbarte Gleichstellung mit der meistbeguenstigten Nation kann nur als eine Gleichstellung wachrend der ganzen Vertragsdauer mit der jeweilig am guenstigsten gestellten Nation verstanden werden." (Von Melle, *op cit.*, 204.)

[76] Cavaretta, *op. cit.*, 89–90.

other hand, Hautefeuille holds that the clause applies only to favors existing at the moment of the making of the treaty.[77] Pradier-Fodére takes this position.[78] Cavaretta cites Schiattarella as holding this opinion.[79] There have been inserted in many treaties express stipulations concerning "favors which shall be granted hereafter" or special provisions against future discrimination. These, it is argued, would be redundant if Von Melle's interpretation be accepted. M. Visser answers that the fact of the appearance of the express stipulation in certain treaties does not justify the argument that it forms thereby an exception to the general rule. One might as well argue, he says, that the persistent repetition of this provision in treaties containing a detailed elaboration of the clause is the proof of its general acceptance. Furthermore, treaties of commerce are meant to have and must have their effect on the future — why maintain that this one clause refers only to the present and the past? The clause, interpreted in this way, loses its greatest value. "Most-favored-nation treatment must mean treatment upon the footing of the nation most favored at any moment."[80]

As a matter of fact, the greatest value of the clause is not in what it obtains, favors present or future, but in what it prevents — discriminations; and there should also be recognized the distinction already pointed out between favors *gratuitously* granted and rights or privileges *purchased*. To Sig. Cavaretta, applying Hall's rules for interpretation, it appears evident that by virtue of the words pure and simple, "there is granted the most-favored-nation treatment." the conceding state simply intends to extend to the other contractant all the advantages already accorded to any other power without referring to any advantages which may be accorded in the future. There is no need to maintain that the concession of future advantages is a constituent element in the clause, which, interpreted in such manner, would rob the conceding state of one of its most important attributes of sovereignty by restricting its liberty of action.[81] M.

[77] Hautefeuille: Histoire des Origines, V, 2, 300, 301.
[78] Pradier-Fodéré, Vol. IV, p. 394.
[79] Cavaretta, *op. cit.*, 90.
[80] Visser, *op. cit.*, 83.
[81] Cavaretta, *op. cit.*, 91–92.

Visser recognizes no examples where practice has followed the other, or "limited-to-the-present," system.[82] But surely the chief complaint which European nations have made against the application made by the United States of the clause has been that the latter refuses to consider subsequent arrangements with third parties upon a reciprocal basis as affecting its most-favored-nation obligations toward original co-contractants. If this be not an example where practice follows the "other system," where can we expect to find an example! Granting that the practice of the United States is based on the distinction between the *kinds* rather than the *times* of the concessions, this does not alter the fact and the character of that practice. This suggests again a difference between favors freely granted and favors extended in return for a compensation. Yet it is conceded even in the practice of the United States that the former extend immediately or upon demand to such nations as possess most-favored-nation treaties.

When the second party to a treaty comes into the enjoyment of some advantage from the operation of a treaty by which the first party grants some advantage to a third, what becomes of the newly acquired right in case the treaty between the first and third parties is subsequently withdrawn? A distinction must be made between cases where such right has accrued to the second party merely as a matter of course, and those where there has been a special correspondence between the first and second governments, granting this new right to the latter. Lehr suggests that the right may have become an integral part of the conventional law between the two powers, which, although growing out of the original treaty, has become independent of both the treaty and the most-favored-nation clause. Even so, if the second nation has not taken the trouble to secure a direct recognition of such right, it can not expect that it will continue after the removal of the original grant.[83] Visser and Cavaretta agree with this. For the advantages thus acquired, the second party has given nothing in return, and to allow these to continue would make them more durable than rights which have

[82] Visser, *op. cit.*, 83.
[83] Lehr, *op. cit.*, 313 ff.

been gained by express stipulation. If, however, the formalities have been complied with and the right recognized, Lehr holds that the favored treatment should continue so long as the original most-favored-nation treaty between the first and second powers remains in force. To this, M. Visser (pp. 84–86), Mr. Herod (pp. 31–32), and Sig. Cavaretta (pp. 172–174) do not assent. M. Visser argues, on the basis of *cessante causa cessat effectus,* that the new treaty with the third power having been abrogated, the foundation of the right no longer exists. Mr. Herod expands and illustrates the same principle, maintaining that the favors in question, though offshoots of the original concession, yet remain subordinate to it, and that, under any other interpretation, the second nation would be securing *gratis* a new favor, thus making it more favored than the most-favored-nation.[84] Such was the position held in determining the question which arose over the application of article 4 of the treaty of July 17, 1858, between the United States and Belgium.[85] In case the first and second powers have made a specific arrangement concerning the favors in question, so formal as to amount to a treaty, the new arrangement comes entirely within the operation of the clause.

This rule does not apply to vested rights and interests. The abrogation, suspension, or termination of a treaty or any part of it by which vested rights were secured will in no wise impair or destroy them.[86]

Following upon the interpretation of this question, another arises: whether, when two nations agree upon the interpretation of a treaty between them, a third can, pleading its most-favored-nation clause, oppose itself to that interpretation, provided it can show such interpretation to be wrong. M. Visser argues, with Schraut, that

[84] Herod, *op. cit.*, 31–32.

[85] "La pratique suit toujours le système suivant lequel, aussitôt les traités contenant les avantages spéciaux devenue caducs, des tiers ne peuvent plus jouir de ces avantages par la voie du traitement de la nation la plus favorisée. Un exemple s'offre encore une fois dans l'article 11 du traité de Francfort. Pendant toute la durée de ce traité, les parties contractantes ne se sont jamais opposées à ce que des avantages, résultant de la clause de la nation la plus favorisée, disparussent en même temps que les traités dans lesquels ils étaient stipulés." (Visser, *op. cit.*, 86.)

[86] Herod, *op. cit.*, 32.

it can not, while Von Melle affirms that it may.[87] To answer this question it would be necessary first to decide what would constitute a proof by a third party that the interpretation of their own treaty by the two contractants is "wrong." What may satisfy a third party is very unlikely to be satisfactory to the first and second, and the "proof" is not likely to be conclusive. Surely, under the rules for interpreting treaties, there can be little ground for difference of opinion other than as it may hinge upon peculiarities in the circumstances under which one or both treaties were made. It would seem almost incontrovertible that the interpretation to which the makers of a treaty agree shall, as regards that treaty, govern their relations, and be final.[88]

What effect will the abrogation of a treaty by one party without the consent of the other have upon the most-favored-nation treaty of a third? It is frequently provided in a treaty that it may be abrogated by either nation, or that after a given time, it may be abrogated upon a given notice. If there is no provision in the treaty, and if a treaty is to exist for a specified time, the unilateral denunciation should have no effect before the end of the specified period. Suppose, however, a country breaks a treaty, even of this sort, and in

[87] "Et les contractants seuls peuvent décider si, et jusqu'à quel point, les avantages en question existent réellement. Il serait donc trop étrange si, deux États étant d'accord sur les droits découlant pour eux d'un certain traité, un tiers, qui est étranger à ce traité, intervenait et imposait aux contractants des droits autres ou plus puissants qu'ils ne le désirent eux-mêmes." (Visser, *op. cit.*, 87.) "Doch wird sich nicht, wie Schraut meint, mit Recht behaupten lassen, dass * * * 'dritte Staaten auf Grund ihres Meistbeguenstigungsrechtes eine anderweitige Auslegung oder Handhabung in der Regel selbst dann nicht beanspruchen koennen, wenn die Berechtigung ihrer Auffassung der fraglichen Vertragsbestimmung nicht bestritten werden kann.' Vielmehr wird ein vertragsmaessig eingeraeumtes Recht seinem ganzen Umfange nach bis zu einer ausdruecklichen Vereinbarung ueber seine Aufhebung oder Aenderung als bestehende, in Folge einer Meistbeguenstigungsclausel auch von dritten Staaten zu beanspruchende Verguenstigung aufgefasst werden muessen." (Von Melle, *op. cit.*, 204–205.)

[88] "Le traité pourtant dont on dérive, au moyen de la clause, le droit en question existe seulement en vertu de la volonté des deux contractants et en dépend. En général, un troisième État n'a rien à faire avec ce traité et ne peut exercer aucune influence sur son application." (Visser, *op. cit.*, 87.) *Cf.* Hall's International Law, 5th Ed., Part 2, Chapter 10.

violation of what seem to be the principles of international law. There is no remedy except that of war for the second party. What becomes of the most-favored-nation rights of a third party? Apparently they will fail, just as though the treaty had been regularly abrogated.

Suppose after two nations have made a treaty on the basis of the most-favored-nation, one, through war or otherwise, loses a part of the territory within which the other enjoyed special privileges. Can the other nation claim a continuance of this most-favored-nation treatment within that territory? The doctrine of *res transit cum suo honore* might seem to imply that the obligation should continue. To apply this, however, is to overlook the distinction between obligations *real* and obligations *personal* as they appertain to a state. The obligations of alliance, friendship, commerce, navigation, extradition, and in general the *personal* relations of a ceding state do not follow the ceded property. The third power can not, through the application of the most-favored-nation clause, continue to enjoy such rights in the ceded or withdrawn territory.[89]

In taking up the conditional clause M. Visser points out that a distinction — which has ordinarily been overlooked — must be recognized between two forms in which it occurs. The condition may be either (1) where a special condition must be fulfilled in order to give birth to the right to favored-nation treatment — for instance one in which the duty on certain goods is lowered if imported directly from the country of the origin; or (2) one in which an equivalent is specified for, the favored interest and the condition being separate, one state merely giving the other certain privileges on the general understanding that the latter will give certain privileges in return. In the former case, the second nation can only claim the favor granted to a third by the first upon fulfilling the same specified condition. There can be no charge of discrimination if the conditions can not be duplicated. Cases occur where particular tariffs are accorded to merchandise imported by a certain route or in a certain way, and where special circumstances govern the importation of raw material, merchandise sent to fairs, petty neighborhood transactions

[89] See Cavaretta, *op. cit.*, 181–182.

in live stock and produce, and border-commerce generally. These things are usually arranged for in treaties. As a rule contiguous states alone enjoy the benefit of such stipulations, other nations being unable to fulfill the conditions. Schraut (*op. cit.*, p. 91) is of the opinion that the clause of the most-favored-nation does not apply to such transactions. Von Melle (*op. cit.*, 236) and Visser (*op. cit.*, p. 162) hold that treaties should so specify if these things are to be excepted, that is, that the clause should apply. The fact that in many treaties special provision is made to cover these cases would seem to support this view. Yet the fact that on account of contiguity, political relations, etc., of certain nations this exceptional treatment prevails in many cases without such specification makes it impossible to lay this down as a general rule.

Supporters of the limited interpretation of the clause claim for the interpretation of the conditional clause, in the second form as well as the first that all are treated on a footing of equality if all *may* obtain the same advantages by fulfilling a like condition, that is, that the demand for compensation does not constitute an infringement of the clause. This view, says M. Visser, can be held only by those who lose sight of the distinction between the two forms of the condition.[90] Von Melle likewise accepts this view.[91] This is nothing more than repeating that these writers hold to the unconditional and literal — more than literal, in fact — interpretation. The distinction between the two kinds of conditions is sound, but

[90] "Par la clause de la nation la plus favorisée, un État stipule dans un traité le droit que ses intérêts jouiront dans le territoire du cocontractant d'un traitement égal à celui de tout autre État. * * * L'État qui s'appuie sur cette clause n'a rien à faire avec les conditions imposées à des tiers par son cocontractant, tandis que celui-ci ne peut pas en appeler contre le premier État à la convention conclue avec un tiers. A l'égard de ce premier État, cette convention est une *res inter alios* dont il ne fait pas partie et qui ne peut ni lui imposer des obligations ni modifier ses droits. Cette convention ne peut donc pas violer le droit du premier État de participer dans le domaine de son cocontractant à tous les avantages dont les autres jouissent *jure aut facto*. Donc aussitôt que, par l'accomplissement de la condition, un troisième État a obtenu un traitement favorisé pour certains de ses intérêts, ce traitement tombe dans le domaine de la clause de la nation la plus favorisée, lorsque celle-ci s'applique bien entendu à des intérêts semblables." (Visser, *op. cit.*, 163–164.)

[91] Von Melle, *op. cit.*, 205–206.

the recognition of it does not inevitably lead to the acceptation of M. Visser's conclusion. Von Melle held M. Visser's opinion concerning both, without — as M. Visser points out — apparently having noticed the distinction between the two. Now, having the difference pointed out, we are as far from accepting M. Visser's subsequent line of reasoning as we would be if we failed to recognize the distinction. In addition to the exceptions to that position indicated elsewhere in this paper, little can be added here other than to deny that it "makes no difference on what conditions the first state has made a treaty with a third" and that "it is a matter of no difference to other [second] states whether this transaction be called a 'favor' or 'reciprocity.'"[92] That it *does* make a difference to the first state whether its concession to a third is freely given ("favor") or granted for a return ("reciprocity") is incontestable. That it should — and in fact does — make a very real difference to a second state follows from the fact that "favors," "freely given," to a third are not in practice denied it and only in case they were refused could it claim that it was being discriminated against to the advantage of the "more-favored" third state; while, in case of reciprocity between the first and third state, it becomes a question answerable often only by experience, whether one or the other nation is more-favored. M. Visser refuses to distinguish between the transactions to which the terms are respectively applied. Moreover, even though there may be ground for arguing that the *unqualified* clause guarantees the co-contractant a "treatment in no respect less-favored than that of any other state," it is altogether too much to make the same claim for the *qualified and conditional form*, and the best that should be claimed for the latter is that it should act as a guarantee and a prohibition against the second nation's being denied the opportunity to make an equivalent concession whereby it may obtain any advantage granted a third. We would therefore take exception to Visser's attitude on this point.

A question which has brought the clause into more prominence than any other of late years, and which has affected English tariff policy as perhaps no other, is that of countervailing duties. The

[92] Visser, *op. cit.*, 273.

"bounty" has been characterized as an attempt by the exporting country to render illusory the protective duties levied by importing countries. The definition is incorrect, in a sense, inasmuch as the bounty is paid just the same upon articles exported to countries which levy no duty as upon those exported to countries which have a protective tariff It is, however, very suggestive of the purpose and effect of the bounty in some cases.

The right to levy countervailing duties has been successfully defended on economic grounds. Can it be as conclusively defended on legal grounds? Are countervailing duties compatible with the most-favored-nation clause? As the question has been raised chiefly with regard to sugar, and as the sugar controversy illustrates its chief points, we may limit the consideration to certain phases of that subject.[93]

In 1874, Great Britain removed entirely the tariff on sugar. The chocolate, marmalade, and other sugar product manufacturers prospered immensely, but the sugar-producing British colonies suffered at once. Consequently they and the English sugar refiners petitioned for a countervailing duty against the bounty-fed sugars of the Continent. Since that time the question has occupied a very important place in politico-economic controversy. In 1880, the British law officers declared countervailing duties incompatible with the most-favored-nation clause. In answer to agitation in 1881 and in 1884, the government, though recognizing the importance of protection against European sugar, felt that it would be impossible to use these duties while the treaties were in force. In 1888, representatives of Holland, England, Germany, Austria, Belgium, Spain, Italy, and Russia signed the Sugar Convention, which provided that each country should exclude bountied sugar. Of the discussions, and the attitude of the powers at that time, M. Visser says: "We can not deduce from the act of the conference a general recognition of the principle that the clause of the most-favored-nation permits the application of countervailing duties. Besides, the convention was not

[93] Space forbids reviewing here the history of the sugar bounties and countervailing duties. For brief resumé, see Visser, *op. cit.*, 165–176. For more complete history and fuller discussion, Kaufmann, *op. cit.*, Chaps. III, IV, V.

ratified." [94] It seems that the British foreign office even then feared that the clause in their treaties would prevent their adherence to the convention.[95] Denmark appears for the same reason to have refused to sign the convention.

In 1889, however, the new Conservative ministry advocated legislation to forbid the importation of bountied sugar. In 1897 was formed the Anti-Bounty League. Under the Tariff Amendment Act of March 20, 1899, countervailing duties equal to the foreign bounties were laid on sugar imported into India. The House of Commons voted to give the government a free hand for further measures which might be necessary for the protection of British-Indian sugar industries.[96] This levying of countervailing duties to neutralize sugar bounties has been characterized as "the first step toward reversing the free-trade policy." In correspondence with Russia in 1899, the British foreign office declared these duties no violation of the most-favored-nation clause. Lord Salisbury held that the Russian system of repaying excise duties on sugar in case of exportation had the same effect as a "bounty of a more direct nature;" that it was the intention of the most-favored-nation clause that goods shall enjoy equality of treatment, but not preferential advantages; that when an artificial preference was produced by the direct legislative act of one party to a most-favored-nation agreement, the other government might "redress the balance of trade which had thus been artificially disturbed" by discontinuing the bounty or the legislative act producing the official stimulus.[97] The same position was taken by the Foreign Office and the British representatives at the Brussels Sugar Convention and by Lord Cranbourne, Mr. Balfour, and Lord Landsdowne in 1902. Lord Landsdowne even offered to abrogate the Russian treaty.[98]

In 1894, under the Wilson Act, the United States laid countervailing duties on bountied sugar. Germany objected, especially on

[94] Visser, *op. cit.*, 169.

[95] Kaufmann, *op. cit.*, 295.

[96] Kaufmann, *op. cit.*, 292.

[97] Note to the Russian government, July 15, 1899, Parl. Pap. Commercial No. 1 (1903). See Moore, *op. cit.*, V, 307.

[98] Moore, *op. cit.*, V, 309.

the grounds that bounties are purely a domestic affair of the exporting nation, and do not therefore affect the importing country, and that the attitude of the United States would render the effects of the most-favored-nation clause illusory by subjecting the exporting party to arbitrary duties which it was the object of the clause to prevent. Secretary Gresham held that the act was in violation of the treaty obligations of the United States,[99] and President Cleveland recommended but did not secure the repeal of the portion of the statute imposing the duty.[100]

July 24, 1897, a Republican and strongly protective Congress passed the Dingley Tariff Act, among the provisions of which an additional duty equal to the net amount of the bounty was to be levied on bounty-fed articles (Sec. 5). The European protests of 1894 were repeated. Russia, Germany, and Austria-Hungary especially, claimed that these duties violated treaty rights. Secretary Olney, abandoning the attitude assumed by Secretary Gresham three years before, denied the validity of their contentions, arguing:

1. The most-favored-nation clause can not interfere with international regulations.

2. The tariff is a statute enacted later than the conclusion of the treaty, and so far as inconsistent with it is controlling.

3. Representatives, not only of Great Britain, but of Germany as well, had expressly declared at the conference of 1888 that the export sugar bounty of a country might be counteracted by the import sugar duty of another without causing any discrimination which could be deemed a violation of the terms of the most-favored-nation clause.[101]

[99] The additional bounty, therefore, levied by the acts of 1894 on all sugars coming from bounty-paying countries is not responsive to any measure that may be considered as constituting a discrimination by these countries against the production or manufactures of the United States, but is itself a discrimination against the produce or manufactures of such countries. It is an attempt to offset a domestic favor or encouragement to a certain industry by the very means forbidden by the treaty. Sec. Mr. Gresham to Pres. Cleveland, Oct. 12, 1894. U. S. Foreign Relations, 1894, p. 239.

[100] Cleveland's message, Dec. 3, 1894.

[101] Mr. Olney, Nov. 13, 1894, 21 Op. 80, 82; Moore, *op. cit.*, V, 306. Mr. Sherman to Mr. von Reichenau, Sept. 22, 1897. U. S. Foreign Relations, 1897, p. 178.

By the Brussels Sugar Convention of March 5, 1902, the signatory powers, Great Britain, Germany, Austria-Hungary, France, Belgium, Holland, Italy, Spain, and Sweden, agreed to prohibit the importation into their territories of bounty-fed sugar. Russia, not having been a party to this convention, subsequently protested vigorously against the countervailing duties imposed by the United States and England. Both these powers, however, maintained not only the necessity for, but the legality of these duties,[102] and the Sugar Commission declared that the means employed by the Russian government to encourage the cultivation and exportation of sugar constitutes bounty-feeding. Russia signed the Sugar Convention in December, 1907.

The argument in justification of the duties in their relation to the most-favored-nation clause is, that if the importing country accepts all sugars on equal terms, this constitutes a discrimination against countries which pay no bounties and those which pay less than the highest, to the advantage of those countries which pay the highest, and that this is contrary to the spirit of the clause. M. Visser argues, in agreement with Mr. Gresham, that it should make no difference to the importing country what were the conditions of exportation, as only the way in which articles enter its ports concerns it; further, that, the purpose of the clause being to prevent arbitrary discrimination, a nation has no right to make arbitrary classifications; that we might as well discriminate between monarchies and republics as between bounty-paying and non-bounty-paying countries; that the bounty system is, like the protective system, merely a matter of internal policy; and that the application of countervailing duties

[102] Where a tax is imposed on all sugar produced, but is remitted on all sugar exported, and the exporter obtains from his government solely by reason of such exportation a certificate, which has an actual value and is salable in the open market, the remission of the tax is in effect a bounty which subjects the sugar, on its importation into the United States, to an additional duty equal to the entire amount of the bounty, according to the act of Congress, July 24, 1897, 30 Stat. at L. 205. Downs *v.* U. S. (1903), 187 U. S. 496. "Nach den Bemerkungen Lord Cranbourne's und Balfour's, * * * 1902, scheint auch ein neues Rechtgutachten der jetztigen Britischen *law officers* vorzuliegen, welches sich in dem gleichen Sinne geaeussert hat." (Kaufmann, *op. cit.*, 297.)

constitutes an interference with the internal legislation of the exporting country.[103]

He recognized (writing in 1902) that the duties were being used more and more, but attributed this to economic, not at all to juristic, causes.[104]

"La compatibilité des droits compensateurs avec la clause * * * n'étant pas soutenable, il faut s'étonner que ce système fasse encore tant de progrès. Seule la politique economique en est cause." States wish to do away with bounties, but cannot do so on account of lack of unanimity. Countervailing duties work toward this end. In effecting this object, many states have had too little regard for the juristic side and the legal questions involved.[105]

Kaufmann, on the other hand, cites a long list of opinions sustaining the legality and justice of the duties.[106] He himself takes the view that the most-favored-nation clause does not forbid countervailing duties, but forbids only a fixed countervailing duty determined upon the basis of the highest export bounty paid, which would be manifestly unfair to other bounty-payers who pay less.[107]

If political economy is — as M. Visser points out — the cause, and if a legitimate object, the doing away with commercial inequalities, is to be attained, surely the most-favored-nation clause ought not be invoked to forbid these countervailing duties — for the clause

[103] Visser, *op. cit.*, 174–176.

[104] "* * * la pratique est douteuse. Les États ne diffèrent pas seulement entre eux en ce qui concerne la compatibilité des droits avec la clause dont nous traitons, mais aussi la manière d'agir des différents États se modifie dans un court espace de temps dans l'un ou l'autre sens. On ne peut donc certainement pas parler d'une reconnaissance générals. Nous n'hésitons pas à soutenir l'incompatibilité de ces droits avec la clause * * *." (Visser, *op. cit.*, 172.)

[105] Visser, *op. cit.*, 176–177.

[106] Kaufmann, *op. cit.*, 298–309.

[107] "Entsprechende Gegenmassnahmen gegen Praemien sind keine Verletzung vertragsmaessig gewaehrter Meistbeguenstigung und sind eventuell Pflicht mit Ruecksicht auf meistbeguenstigte dritte Staaten." (Kaufmann, *op. cit.*, 338.) "Der materiellen Auffassung der Meistbeguenstigungsclausel entsprach daher bei verschiedener Hoehe der fremden Praemien nicht ein einziger gleichmaessiger Ausgleichzoll, sondern verschieden hohe Ausgleichzoelle je nach der verschiedenen Hoehe der fremden Praemien." (*Ibid*, 280.) On the policy of the United States, compare *Ibid*, 274–280. On the policy of England, *Ibid*, 280–302. Mr. Herod considers the duties both equitable and legal. Herod, *op. cit.*, 121.

owes its existence, if not its origin, to practical economic necessities; it has been a most potent instrument in the struggle for commercial equality, and the highest value set upon it by friends and enemies alike has been its power to level artificial inequalities and maintain commercial equilibrium.

International law has not yet become so established that it may be cited as either affirming or denying the right in question; whatever appears the more practical and equitable interpretation will become the law. At present, economic interests, the equities involved, and the tendency of international opinion (witness the Brussels Sugar Convention) certainly favor the attitude assumed by the United States and Great Britain.

Mr. Herod (Chapters VI–X) considers in detail many cases, from which he draws conclusions which we may conveniently group and consider as a body of quasi-rules, for most-favored-nation treatment. Omitting the discussion, we would cite as among the more important of these, the following:

1. The general form of the most-favored-nation clause, or the more limited form specifying " no other or higher duties " requires that duties on imports and exports shall be uniform and collected without any unfair discrimination against the products of the contracting state. (pp. 57–8.)
2. The equality of duties applies to the time at which they are levied as well as to their amount. (p. 60.)
3. Silence on the part of the legislature under its sovereign powers, to regulate commerce, implies that that branch of commerce on which no expression is given is to be free. (pp. 62–3.)
4. It does not concern one state that the articles of commerce of another are taxed or free of duty, provided that the enforcement of the legislation governing their taxation in no way discriminates against its own articles of commerce. (pp. 63–4.)
5. A state will not be acquitted of a charge of unfair and unequal discrimination if it extends a gratuitous favor to the products of a particular geographical district which may or may not contain organized states, and refuses it to nations which are entitled to the same treatment under the most-favored-nation clause. (p. 70.)
6. A regulation which relieves the importer of goods of a country from any charge on the transaction necessary to bring the goods to the seller must be extended upon equal terms to the importers of the goods of those nations which enjoy the privileges of the most-favored-nation. (p. 77.)

7. Where a tonnage tax is national in character, and a favor is extended by one nation to the vessels of another, the same favor upon terms of reciprocity should be readily granted to the vessels of all other nations enjoying the privileges of most-favored-nation treatment. (p. 82.)

8. A nation enjoying the privileges of most-favored-nation treatment in matters of commerce can justly claim upon terms of reciprocity, rates as low as those extended under like conditions to any other nation. This applies to railroad rates, telegraph, telephone, post, bills of lading, etc. (pp. 102–5.)

9. A tax upon a bounty product, equal to the unnatural advantages which it enjoys, is justifiable. (p. 121.)

10. The general clause of the most-favored-nation does not comprehend special engagements of reciprocity. (p. 112.)

11. In questions of considerations — the sum of the concessions on one side must be taken as the consideration for the total of the favors obtained from the other party. (p. 113.)

12. Where a state has by a special treaty of reciprocity granted favors in matters of commerce and navigation, it should in justice grant to every other power with which it has treaty relations an opportunity by negotiation to arrive at what would be a fair equivalent for the favors extended by the special treaty. (p. 113.)

13. When there is withheld from a nation or its citizens any privilege, favor, or immunity to which, by operation of the clause, it or they are entitled, a claim for damages, if actual damages have been suffered, is not barred by the statute of limitations, on the theory that "where a treaty is made between two independent powers, its stipulations cannot be deferred, modified, or impaired by the action of one party without the assent of the other. If the parties, by their joint act, have established no barrier in point of time to the preservation of any treaty made by them, then neither country can interpose such limit." (p. 33–4.) If the discrimination has taken the form of an actual money tax or loss of property, the claim for restitution will rightly carry with it interest upon the amount unjustly levied when such tax has been paid under protest.

14. Where the constitution or practice of a state gives equal weight to laws and treaties and makes that which is of latest date repeal others, the courts, following the constitutional rules, are obliged to sustain a law, even though it operates to deny rights guaranteed by a treaty concluded previous to the passing of the law. This does not, however, according to the law of nations, weaken the treaty obligations of a nation, and a state remains in honor bound to carry out the stipulations of its treaties. A breach in treaty obligations renders a state committing it liable in international law and in equity to the injured party. (pp. 34–5.)

We may add to this:

15. As between two treaties which two different nations have with a third, and which are in conflict, that of older date prevails.[108]

STANLEY K. HORNBECK.

[The remainder of this article, which will appear in the October JOURNAL, will deal especially with the most-favored-nation relations of the United States and Germany, arguments for an against the use of the clause, and suggestions for improvement.]

[108] Hall: International Law, 342; Bluntschli: Le droit international codifié. 3d ed., 414. Mr. Herod also suggests — but this can not be looked upon as an expression of practice — that it seems only fair that a nation which through the policy of free trade imposes no duties on exports, should be entitled by favored-nation treatment to all the benefits of a treaty of reciprocity founded solely upon mutual conditions in exchange of articles of commerce, for she has not only conceded the equivalents, but has done so in advance of such nations as have bought the favor. (*Op. cit.*, 118.)

THE INTERNATIONAL OPIUM COMMISSION[1]

Part 1

The International Opium Commission proposed by the United States and accepted by Austria-Hungary, China, France, Germany, Great Britain, Italy, Japan, The Netherlands, Persia, Portugal, Russia, and Siam convened at Shanghai on the 1st of last February, completed its study of the opium problem throughout the world, and based on that study, issued nine unanimous declarations. The Commission adjourned on February 27th.

The Commission's work is interesting from several points of view. It was the first step towards the solution of the opium problem by international action. It was the second Commission of its kind to meet since the formulation of the Hague rules of 1899 as to the function of such Commissions. Its organization, its rules of procedure, the spirit in which it attacked its problem, avoided a majority and minority report, and declared unanimously, establish a precedent for the guidance of all future Commissions of Inquiry. The world at large, and even many of those who have agitated the opium question in the past, have regarded the problem as one that concerned Great Britain and China alone. The work of the Commission demonstrated beyond a doubt that it is a problem of almost world-wide extent, and that the United States has a large and increasing interest in it.

Before dealing with the Commission and its deliberations, it will be well to glance as rapidly as possible at the opium question as it appeared between the issue of the Report of Her late Britannic Majesty's Royal Opium Commission in 1895, and the beginning of the new movement against opium which resulted in the calling of the International Commission. To take the United States first:

[1] The various treaties and statutes mentioned herein appear in the SUPPLEMENT, pp. 253–276.

THE UNITED STATES

The attitude of the United States government towards the traffic in opium beyond its borders has been on the whole admirable. When China was protesting most vigorously against contraband opium from India, the United States contracted one of its earliest treaties with an Eastern country, — that with Siam in 1833. Reference to that treaty (*vide* SUPPLEMENT) will show that Americans were forbidden to engage in the opium traffic with Siamese except at the risk of being dealt with by the Siamese authorities.

In the next treaty with Siam, that of 1856, the United States somewhat relaxed its attitude in the matter of opium. Reference to article VII of that treaty will show that Americans were permitted to import opium free of duty, but that they could sell it only to the opium farmer or his agents. So far as it can be learned this was not against the wishes of the Siamese government. The revenue of Siam was in part derived by farming out the sale of opium. Siam produced no opium, and therefore had to import it. The importation was legalized by the Siamese authorities, and Americans were permitted to engage in the trade.

The most important declaration of the United States in regard to the opium traffic is contained in its first treaty with China, — Treaty of Wang Hea, of 1844. By reference to article XXXIII of that treaty it will be seen that the United States entered into an obligation to prevent her citizens from trading in opium or any other contraband article of merchandise, and that those of her citizens who violated the treaty were subject to be dealt with by the Chinese government, without being entitled to any countenance or protection from the United States. Article XXXIII certainly marked the official attitude of the American people towards the Chinese opium traffic, and it had the effect of driving Americans out of the trade. For it was no light matter to fall under the Chinese law against trade in opium. In our next treaty with China — that commonly known as the Tientsin Treaty of 1858 — the official position of the American government relaxed, and we accepted, along with France and Russia, the tariff arrangement as contained in the British tariff agreement of the Tientsin Treaty. Beyond a doubt the American

minister of that time largely influenced the position of the government. The views that he held have been alluded to [2] in Lord Elgin's position towards opium in 1858. His important letter will be found in the SUPPLEMENT.[3]

Following the Tientsin Treaty, Americans were free to engage in the opium traffic, and beyond a doubt they did so. But I think it may be stated that the attitude of the American government towards opium, as evidenced by the Treaty of Tientsin, was only a temporary lapse from the position it has constantly held towards the traffic; for, in the "American-Chinese Commercial Treaty" of 1880, the United States recovered by binding itself in the matter of the opium trade. By reference to article two of that treaty it will be seen that a pact was entered into which forbade American citizens from engaging in the importation of opium into any of the open ports of China, or to transport it from one open port to another open port, or to buy and sell opium in any of the open ports of China. Chinese subjects were also prohibited from importing opium into any of the ports of the United States. The American government could not, of course, engage with China in this or any other treaty to forbid her own citizens from importing opium into the United States. That was a matter of United States municipal law. Article two was made effective in 1887, when Congress passed a statute which fixed the penalties for its violation. It was held by Mr. Edmunds, who introduced the bill, which afterwards became a law, that American citizens were prohibited from the opium traffic in China by the treaty of 1858, or at least that they were subject to the jurisdiction of the Chinese courts and authorities for trial and punishment in the event of engaging in the trade. Mr. Edmunds further stated that

> By the treaty of 1858, negotiated by Mr. Reed, it was provided in article XI that citizens of the United States committing any "improper," i. e., illegal act in China should be punished only by the authorized officials of the United States and according to their law, and that arrests in order to trial might be made by the authorities of either country. This provision in this treaty may perhaps be fairly considered as superseding the provisions in the treaty of 1844 remitting to the

[2] *Vide infra*, p. 657.
[3] P. 269.

jurisdiction of the Chinese authorities the violators of the opium laws of the Empire, although, as the former provision was special in regard to one topic, it may not be clear that the later provision just referred to would supersede or repeal the former special one.

The fourteenth article of the same treaty states that "The open ports which the citizens of the United States should be permitted to frequent are the ports and cities of Canton, * * * and any other port or places hereafter by treaty with other powers or with the United States open to commerce, and to reside with their families and trade there, and to proceed at pleasure with their vessels and merchandise from any of these ports to any other of them. But said vessels shall not carry on a *clandestine* and *fraudulent* trade at other ports of China not declared to be legal, or along the coast thereof; and any vessel under the American flag violating this provision shall, with her cargo, be subject to confiscation to the Chinese government; and any citizen of the United States who shall trade in any contraband article of merchandise shall be subject to be dealt with by the Chinese government, without being entitled to any countenance or protection from that of the United States.

Mr. Edmunds, in quoting these articles relating to improper, clandestine, and fraudulent trade, appears to have overlooked the fact that by the commercial agreement of the American-Chinese treaty of Tientsin of 1858, the importation of opium into China was no longer a clandestine or fraudulent trade, but a legalized trade on the payment of duties.

The last treaty of the United States with China in which opium or its derivatives is mentioned is the "Treaty of Commercial Relations," October 8, 1903. In the SUPPLEMENT[4] it will be seen that by article XVI of the Commercial Treaty of 1903, the government of the United States consented to the prohibition by the government of China of the importation into China of morphia and instruments for its injection except for medicinal purposes and on payment of a tariff duty. By the same article the Chinese government undertook to adopt at once measures to prevent the manufacture in China of morphia or instruments for its injection. A similar article is contained in the British Commercial Treaty of 1903. These articles in regard to morphia became effective on the 1st of last January, all the treaty powers having acceded to the morphia articles of the American and British treaties.

[4] P. 255.

A treaty similar to that of 1880 with China was negotiated with Korea in 1882. Article VII of that treaty is practically the same as article two of the Commercial Treaty of 1880 with China. But so far Congress has not made it effective by appropriate legislation, as was done in the case of the treaty with China. Owing to the altered status of Korea it is not now necessary to effectuate the treaty by statute.

In our early relations with Japan, the attitude of the American government on the opium question was correct, for in article IV of the Treaty of Amity and Commerce of 1858, the importation of opium into Japan was prohibited to American citizens. That article remained in effect until Japan assumed her full sovereign rights, and was thereby able to forbid or not the importation of opium.

Though not an international pact, the attitude of the American government in regard to opium is well illustrated in the Act of February 14, 1902,[5] which prohibits any one subject to the authority of the United States to sell or otherwise supply opium to any aboriginal native living within certain parallels of latitude and certain meridians of the Pacific Ocean.

As will be pointed out later, the United States found itself confronted by a serious opium problem when it occupied the Philippines. The outcome of the investigation of that problem and its effect on the opium question as a whole is discussed further on,[6] and will be referred to, completing the study of the American opium question. In regard to that question as it affects the United States, it will be briefly stated that a large amount of Turkish opium has been annually imported into the country, and there is abundant evidence that the morphia derived from it has corrupted a large percentage of the population. The importation of opium prepared for smoking had been legalized, and the Pacific ports had drawn on the Portuguese colony of Macao for over 150,000 pounds per annum for many years past. Eighty per cent. of this form of opium was absorbed by Chinese smokers, the balance by degraded white and black Americans.

[5] Chapter 18, 32 Stat. at L. 33; see SUPPLEMENT, p. 256.

[6] *Vide infra*, p. 669.

Reliable estimates place the needs of the American people for opium at 100,000 pounds at most. The annual importation of medicinal opium has been over 500,000 pounds for several years past, — that is, over 550,000 pounds of opium are annually imported into the United States, and used illicitly.

AUSTRIA-HUNGARY

There is no home opium problem in Austria-Hungary. The poppy is not grown for opium. All opium imported comes from Turkey, and the use of it for other than medicinal purposes practically is unknown. What is said of Austria-Hungary may be said of Italy.

CHINA

It is a common error to suppose that China depends on India alone for the opium consumed by her *habitués*. Since the middle of the eighteenth century, there has been a progressive increase in the internal production of opium in China. Until a few years ago it was estimated to be in the neighborhood of three hundred and fifty thousand piculs.[7] Mr. Leech, the councillor of the British Legation at Peking, estimates that in the year 1906 it was three hundred and thirty thousand piculs, and that the revenue derived from it by the Chinese government amounted to six million five hundred thousand English pounds; but that only one million seven hundred and fifty thousand English pounds reaches the central government, the remainder being employed in the provinces. Of the total production of Chinese opium, four thousand seven hundred and thirty piculs were in 1906 exported to foreign countries:

4,013 piculs..... French Indo-China.
147 " ..... Hongkong en route probably to Formosa, or to be smuggled into the Philippines.

China imports an average of about 51,000 piculs of Indian opium. This may be tabulated for 1906 as follows:

[7] The picul being 133⅓ lbs. avoirdupois.

	Indian		
Foreign raw opium imported in 1906	Malwa	14,465	piculs
	Patna	25,486	"
	Benares	13,479	"
	Total	15,430	"
Other kinds from Persia and Turkey		795	"
	Total	54,225	"

Taking the net amount of native Chinese opium obtained in China, she may be said to have required for her own consumption in 1906:

Native opium	325,270	piculs
Foreign opium	54,225	"
Total	379,495	"

or 50,599,333 pounds weight or 22,588 tons, of which about one-seventh comes from India.

These figures will show what a tremendous problem the opium question is to China, for she not only has to deal with the importation of foreign opium, but with the much larger amount of native produced by her own people and used by them. One of her great difficulties in stamping out the opium habit amongst the Chinese population has been this internal growth of the poppy, and the bad example set to her people by the continued importation of foreign opium.

China is bound by several treaties and agreements in regard to foreign opium. Although the treaty of Nanking, negotiated after the so-called Opium War of 1840, left opium as before the war, contraband, there is certain justification in calling that war an opium war, for by article IV of the treaty, " The Emperor of China agrees to pay the sum of six million dollars as the value of opium which was delivered up at Canton in the middle of March, 1839." Opium had for many years before that war been contraband (since 1796), and was so regarded by the British government and the agents of the East India Company at Canton. The contraband trade in opium was one of the immediate causes of the war. The opium that was seized and

destroyed by Commissioner Lin was contraband opium. By compelling the Chinese government to pay for it, there was fixed in the popular mind at any rate the idea that that war was an opium war. From the Treaty of Nanking onward, trade in opium to China was contraband, although the opium war had left China in rather a weak position to enforce her views.

The Treaty of Tientsin was negotiated in 1858, following the Arrow War. In the tariff annexed to the Treaty of Tientsin the importation of opium was legalized by the Chinese government, and admitted officially for the first time since the prohibitory Edict of 1796. It was made to pay thirty taels per one hundred catties (or picul). There is no evidence that the British plenipotentiary, Lord Elgin, forced the Chinese government to officially recognize the importation of opium. It is known that Lord Elgin himself considered the Arrow War a deplorable adventure, and regarded the trade in opium with horror. He has stated that he had

> A strong if not invincible repugnance, involved as Great Britain was in hostilities at Canton, and having been compelled in the north to resort to the influence of threatened coercion, to introduce the subject of opium to the Chinese authorities,[8]

and it has been stated by an eye-witness that

> For the first eight, nine, or ten months Lord Elgin never referred to opium as a possible item of negotiation at all, but refererd to it as a thing deplorable, from what he saw in the streets; from the emaciation and wretchedness of the opium smokers he came across.[9]

As an indication of Lord Elgin's attitude towards opium it may be stated that during an interlude in the Chinese negotiations that ended in the Treaty of Tientsin, he visited Japan to arrange the first treaty between that country and Great Britain. That treaty prohibited the importation of opium into Japan. Lord Elgin appears to have been largely influenced in his conduct towards the Indo-Chinese opium question by a letter addressed to him by Mr. Reed, who was then the plenipotentiary of the United States in China. Mr. Reed had gone

[8] China Correspondence, 1859, p. 396.
[9] R. C. Report 1, p. 90.

to China strongly opposed to the opium traffic. During the Arrow War he seems to have been greatly affected with the hollowness and danger of the entire opium business as it then existed, and he urged on Lord Elgin that there seemed to be but two courses which he could pursue; that he must either urge the Chinese authorities to interdict the opium trade and to assure them that the British government would neither directly nor indirectly aid any one who engaged in it, and that the British government should prohibit the cultivation and export of opium from India. His only other course was to urge the Chinese to admit opium under a tariff. Mr. Reed further states:

> No one doubts it is very pernicious and demoralizing. I am confident Your Excellency will agree with me that its evils, as the basis of an illegal, connived at, and corrupting traffic, can not be overstated. It is degrading alike to the producer, the importer, the official, whether foreign or Chinese, and the purchaser.[10]

The entire letter of Mr. Reed is worth reading.[11]

Lord Elgin seems to have been well enough informed to know that should he urge prohibition of the growth of the poppy and the export of opium from India, it would be hopeless. The second alternative was the only course open to him. Mr. Lawrence Oliphant, Lord Elgin's delegate in the transaction of the Commercial Treaty, has given an account of the circumstances which led to the Chinese admitting opium into this Commercial Agreement.[12] There is no doubt that the Chinese were opposed to the legalization of the traffic, but what could they do? The British official report states:[13]

> China still retained her objection to the use of the drug on moral grounds, but the present generation of smokers, at all events, must and will have opium. To deter the uninitiated from becoming smokers, China would propose a very high duty; but as opposition would naturally be expected from us in that case, it should be made as moderate as possible.

Lord Elgin wrote to Lord Malmsbury:

[10] China Correspondence, 1859, p. 394.
[11] *Vide* SUPPLEMENT, p. 269.
[12] *Vide* SUPPLEMENT, p. 262.
[13] China Correspondence, 1859, p. 401.

It is hoped by this arrangement (the legalization of the opium traffic), on the one hand, a term will be put to the scandals and irregularities to which a contraband trade at the ports necessarily gives birth; and, on the other, that occasion will not be furnished for the still greater scandals and irregularities which would inevitably arise, if foreigners were entitled under the sanction of treaties to force opium into all districts of the interior of China.[14]

As will be seen by a reference to other Tientsin treaties of the same date, America, France, and Russia followed the British lead on opium so far as it is affected by the British treaty.

The opium trade was regulated by the Tientsin treaties until the "Additional Article" to the Chefoo Agreement was signed at London, 1885.

Under the "Additional Article" to the Chefoo Agreement of 1876, the tariff on opium remained at 30 taels per chest of 100 catties, but was made to pay a sum not exceeding 80 taels per chest as likin.[15] The additional 80 taels per chest did away with the likin or transit duties in the interior of China. After the opium had paid the 30 taels duty and been released to the merchants from bond, transit certificates were issued to the owners and such certificates freed the opium from the imposition of any further tax while the opium was in transport in the interior, providing that the package had not been defaced or tampered with. The certificates had validity only in hands of Chinese subjects, and did not entitle foreigners to convey or accompany any opium into the interior. Since this "Additional Article" was signed at London, in 1885, opium has been admitted to China under its terms. It may be terminated at twelve months' notice by either party, when the import of opium into China would revert to the terms of the "Commercial Agreement" of the Treaty of Tientsin. Until the recent movement against opium was instituted the opium trade in China was governed by this "Additional Article" to the Chefoo Agreement of 1876. It is now under the operation of the "Ten Year" Agreement,[16] which will be referred to later.

[14] *Ibid.* 4, p. 425.
[15] *Vide* SUPPLEMENT, p. 263.
[16] *Idem*, p. 264.

FRANCE

In France there is no poppy culture for opium. Attempts have been made to grow it for the extraction of opium, but they were not successful. Opium is imported into France chiefly from Turkey in the crude form for medicinal purposes only. There does not seem to be any ground for the statements so frequently met with in the press that the use of morphine is widespread in France. In Paris, Toulon, and Bordeaux there is probably a large illicit use of morphine and considerable smoking of opium, but it seems to be confined to these few cities. In French Indo-China only a small amount of opium is produced, and it may only be imported by the official Administration of Customs and Excise. The manufacture of smoking opium in French Indo-China is a government monopoly or *regié*, with a single factory at Saigon. The crude opium is imported from Calcutta and the adjoining Chinese province of Yŭnnan. The import for 1903 was 251,771 kilos. As the result of recent anti-opium legislation the 1907 imports show a decline of 45 per cent. In 1903 the official sales of opium prepared for smoking amounted to 122,941 kilograms; but since the new anti-opium movement and the recent regulative legislation, this has been reduced about twenty-five per cent. France has several treaties with China in regard to the importation and exportation of opium. In 1858 the French followed the lead of the British, as expressed in the Tientsin Treaty, and French subjects were permitted to import opium into China on the payment of the specified duty. The French Treaty of Tientsin covered the opium trade between French Indo-China and China, until the "Convention of Tientsin of 1886," when the contracting parties, in article XIV, interdicted commerce in opium between the frontiers of Tonkin, Yŭnnan, Kwang Si, and Kwang Tung. But in article V of the additional Commercial Convention of 1887 the trade was reopened under certain specified conditions.[17] The trade by land was allowed on payment of an export duty of taels 20 per picul, but French merchants and persons under French protection were restricted as to the place of trade. There were also

[17] *Vide* SUPPLEMENT, p. 259.

restrictions as to reimportation of Chinese opium by the coast ports. This, shortly, was the state of the opium question in French Eastern possessions, and the conditions under which the trade was carried on with China until quite recently. The present day conditions will be referred to later.

GERMANY

In Germany the poppy is not grown for opium. All opium is imported; chiefly from Turkey. Under the Imperial Ordinance of October 22, 1901, opium could be only imported, manufactured, and sold for medicinal purposes. In Germany's Eastern possession, Kiao Choa, the cultivation of the poppy is prohibited, and, as will be seen by the treaty and ordinances in the SUPPLEMENT,[18] opium can be imported or sold only under strict regulations. The object of the colonial government is first to control and finally to suppress the use of the drug except for medicinal purposes.

GREAT BRITAIN

The opium problem of India needs to be stated from two points of view. There is the problem as it concerns British India and the problem as it concerns the native states of India. In British India the government has full control of affairs; in the native states only an advisory control, or a control secured by treaty. In British India the growth of the poppy, the manufacture of opium, and its internal distribution and consumption is a government monopoly. In the native states, the cultivation of the poppy and the manufacture of opium is free. Under the monopoly, established in 1773, two agencies have been set up in Bengal, one at Patna and one at Benares, to handle the opium business for the British Indian government. When sowing time arrives these agencies make a cash advance to the cultivator according to the amount of land he proposes to put under poppy cultivation. When the crop has ripened a further advance is made to the cultivator, and he is finally settled with after his opium has been tested, graded, and valued by the agencies. The monopoly opium, after being graded and packed, is divided into two

[18] Pp. 260–1.

parts, — one known as excise opium, which is reserved for internal consumption in British India and dispensed under excise regulations; the other known as provision opium, which is sent to Calcutta and sold by auction to the highest bidder. When the provision opium is in the hands of the successful bidders it is beyond the control of the British Indian government, and it is trafficked in according to the laws of supply and demand. In the native states, the poppy is freely grown and opium produced without restriction or control by the British Indian government. It then passes by certain specified routes to Bombay ports, where it is sold for export, except a certain amount retained for consumption in the Bombay Presidency. The control of the British Indian government over this kind of opium, known as Malwa opium, is limited to imposing the routes by which the opium reaches the merchants at the seaports of the Bombay Presidency, and by the collection of a transit tax on it as it passes from the native states to British Indian territory. After the sale of the provision, and the collection of the transit tax on Malwa opium, the Indian government washes its hands of the drug. It then passes by ordinary channels of trade to China, the Strait Settlements, Formosa, and other Eastern countries. The total average exportation from all India for the five years 1901–5 was sixty-seven thousand chests, of about one hundred and forty pounds each. Of this, China annually imported in the same years an average of fifty-one thousand chests. The difference, — or sixteen thousand chests, — passed to other Eastern countries, to Mexico, and the United States. Until the recent prohibitory legislation, the United States absorbed a total of about 250,000 pounds annually, after it had been converted into smoking opium at the Portuguese colony of Macao. It should be clearly understood that the revenue derived by the Indian government from opium consists of the transit duties levied on opium known as Malwa opium, produced in the native states of India; from the profit on provision opium over and above the cost of its production and from a tax on excise opium consumed in British India. The Indian opium revenue is large, but is a steadily diminishing factor in Indian finance.

The Indian argument for the continuation of the opium trade was a very potent argument — revenue.

However, it

Was not to be relied upon. In the fourteen years ending 1894, the average revenue was five million of pounds; in the eleven years 1894–1905, it fell to three million pounds. In 1880 it represented fourteen per cent. of the aggregate revenue of India. In 1905 it represented only seven per cent.[19]

In Great Britain itself no opium is produced. The chief supply is from Turkey and is devoted to ostensibly licit medicinal ends. The "Act to Regulate the Sale of Poisons" of 1868 is said to effectively prevent the illicit use of opium and its alkaloids.

Self-governing Colonies

Australia

Australia has a large Chinese population, and therefore an opium problem. Opium smoking was widely indulged in by the Chinese, and at one time threatened to spread to the white population. As an index of the large amount of opium consumed, it will be only necessary to state that in 1903 42,429 pounds were imported, and some sixty odd thousand pounds of gum opium for medicinal purposes. Part of the latter was undoubtedly surreptitiously manufactured into smoking opium by the Chinese and others. In addition, a considerable amount of smoking opium was smuggled in from Macao, Vancouver, and other places of manufacture. In the Commonwealth Customs Act of 1901 it was enacted that the following are prohibited imports: "All goods, the importation of which may be prohibited by proclamation." The effect of this legislation will be referred to later.

Canada

In Canada, previous to the Prohibitory Act that went into effect July 20, 1908, opium was imported from Turkey for medicinal purposes. Indian opium was imported into the West Coast cities,

[19] So Lord Morley in the House of Commons, May 30, 1906.

where it was prepared for smoking, sold, and consumed by the Chinese and others, while a large part was smuggled into the United States. The Honourable McKenzie King has stated in a report on the subject that the factories manufactured between six hundred and six hundred and fifty thousand dollars worth of smoking opium in the year 1907, and that much of the product was smuggled into the United States and Canada. Little or no smoking opium was imported into Canada, it being more profitable to import the crude drug from India, and then prepare it for the pipe.

New Zealand

New Zealand has never had an opium problem, and since 1890 has vigorously prohibited its importation and use except for medicinal purposes.

South Africa

South Africa had no opium problem until the introduction of indentured Chinese coolie labor to the Rand. The opium habit was confined amongst them and kept alive by undesirable whites, and it tended to spread to the black population. Much of the crime that is committed by these coolies is attributed to the use of smoking opium.

British Crown Colonies

In Hongkong, the Strait Settlements, the Federated States, British North Borneo, Ceylon, a large revenue was derived by farming out the manufacture and sale of smoking opium. Such opium is made from imported Indian opium. In Ceylon the spread of the practice of smoking opium has been rapid, the imports jumping from 1,562 pounds in 1840 to over 23,000 pounds in 1900. In the Strait Settlements the revenue derived from opium is almost 50 per cent. of the total revenue of the colony. In 1898 it was 2,332,186 Mexican dollars, representing 45.9 per cent. of the total revenue. In 1904 the revenue derived from opium was $6,357,727, or 59.1 per cent. of the total revenue of the colony. The growth in the revenue derived from opium in this colony is a fair index of the extent to which the

opium smoking is indulged in, and of its tendency to spread amongst the Chinese members of the community. In the neighboring Federated Malay States, where the opium farm is sold to the highest bidder, the states derived in 1896 about $1,500,000 from it. By 1904 the revenue from the farm had increased to over $2,597,000. At Hongkong, where the farm system is in vogue, the sale of opium represented 28.42 per cent. of the total revenue of the colony for the year 1904. The British treaties covering the trade in opium have been referred to.[20]

JAPAN

The Japanese government and people have from time immemorial regarded the misuse of opium with horror. In all the early treaties with foreign states it was stipulated that the trade in opium was to be restricted. Since Japan regained her status as a sovereign power most stringent laws have been enacted covering the importation and manufacture of opium, and it may be stated that Japan has a prohibitory law against the misuse of opium which is effective. On acquiring Formosa, the Japanese authorities found that the smoking habit had been confirmed under Chinese rule, and that it could not be immediately got rid of. The policy of gradual suppression was accordingly adopted. Investigation showed that there were over two hundred thousand opium smokers in Formosa, and it appeared to the Japanese authorities that it would be difficult for the smokers to break off the habit at once. There was also a danger that the people would be alienated in the event of the Japanese applying their own strict home laws to the island. The government, therefore, determined to put the importation, manufacture, and sale of smoking opium under government control. The Formosa Opium Ordinance was promulgated in the year 1897, and the regulations for the enforcement of the ordinance were issued later on in the same year. On inquiry, it developed that the importation of opium into the islands before the Japanese occupation had averaged about four hundred thousand pounds per annum. Under the system of government control, licenses are granted to the Formosa Chinese, who are

[20] *Supra*, pp. 656–7.

the only members of the population addicted to smoking. It is claimed by the Japanese that by the system of government control they can gradually suppress the use of the drug. No opium is produced in Formosa. It is imported from India, Persia, Turkey, and China. The importations have averaged about two hundred and twenty-five thousand pounds per annum since Japanese control of the island was made effective. In spite of her strong stand against the misuse of opium Japan has entered into no special pact with China to restrain her citizens from engaging in the opium trade.

THE NETHERLANDS

In the Netherlands itself the poppy is not cultivated for opium. Neither is it cultivated in her East Indian possessions. The importation of opium and its manufacture into smoking opium and the distribution of the latter is a government monopoly, or *regié*. The opium sold by the *regié* is manufactured in a factory especially built for the purpose. Both Indian and Turkish opium are used, but chiefly the former. The factory is managed by a chemist as director, who is assisted by two colleagues, an engineer as deputy director, and by a technical and administrative staff. There is a large native staff and an inspector in chief, with a staff of sub-inspectors. There are certain prohibited areas in the Netherlands islands, where the use of opium is prohibited. None of the *regié* opium is exported. For the years 1889–93, taking the population of 24,119,136, the annual consumption of smoking opium per head in tahils was 0.042, a tahil being equal to $1\frac{1}{3}$ ounces avoirdupois. The net revenue from the *regié* for the year 1907 was 13,317,000 francs. The government of the Netherlands India professes to aim at the control and gradual extinction of the vice of opium smoking by means of the *regié*. By the Treaty of Tientsin of 1863 Dutch subjects could legally import opium into China.

PERSIA

Persia is a large opium producing country. The poppy is cultivated quite freely, and there is no attempt by the government to monopolize the manufacture and sale of opium. The amount of

opium produced in Persia cannot be stated accurately, but it ranges from a million to two million pounds. The habit of smoking opium either alone or with tobacco is fairly common, and it is estimated that from two hundred to three hundred thousand pounds were consumed in Persia annually. The balance of the drug is exported to foreign countries, — the high grade opium going to Europe and America for medicinal purposes, and the rest to Hongkong and the Straits Settlements to be manufactured into smoking opium. The Persian government derives a large yearly income from an export duty on the drug. In 1901–4 the opium revenue amounted to about $350,000. Persia has no treaty relations with China, and for that reason China may forbid the importation of the Persian drug into the country. As will be seen later, an arrangement has been made whereby the imports of her Persian opium are to be reduced by one-tenth per annum.

PORTUGAL

The poppy is not grown in Portugal for its opium, — nor is it grown in her African and Indian or Chinese possessions. In the colony of Macao alone has Portugal an opium problem. In that colony the vice is widespread amongst the Chinese population. Until the year 1820 Macao was the principal depot of opium from India, but it gradually lost its hold on the trade after Hongkong was taken from China by the British, as the result of the so-called Opium War. In 1878 Macao ventured into the industry of boiling crude opium into smoking opium, and shipping it abroad, as well as supplying her own people. It was carried on by private individuals for some time. In 1887 a government monopoly for the importation, manufacture, distribution, and exportation of opium was established. The sole right to manufacture smoking opium was granted to a Chinese syndicate. By the last contract, signed May 4, 1903, they paid $334,000 to the government at Macao for the privilege. From 1908–9 the opium revenue at Macao represented 38.8 per cent. of the total revenue of the colony. The trade in opium between Macao and China was subject to the tariff annexed to the Anglo-Chinese Treaty of Tientsin of 1858. This remained in force until 1887,

when a "Treaty of Amity and Commerce" was negotiated, which, among other things, calls for the cooperation of the Portuguese government to prevent a contraband trade in opium. By article IV of that treaty, Portugal agreed to cooperate with China in the collection of duties on opium exported from Macao into China ports, the basis of this cooperation to be established by a convention appended to the treaty. By article I of the appended "Convention and Agreement," the rules were defined under which the opium trade is carried on between the Portuguese colony of Macao and China (*vide* SUPPLEMENT). This agreement operated until lately, when a new agreement was entered into, which will be referred to later.

RUSSIA

There is no evidence at hand that would show that Russia has an opium problem in her home territories. Amongst the Mohammedan population opium is used combined with tobacco, and in Siberia, where there are Chinese, opium smoking exists to some extent.

The Russian treaty of Tientsin, June 13, 1858, followed the British lead in regard to the opium habit with China. By article XV of the Treaty of St. Petersburg opium was declared to be contraband, and the trade in it prohibited (*vide* SUPPLEMENT).

TURKEY

Although Turkey was not able to send a delegation to Shanghai, still the opium question cannot be stated without taking into account the opium production of that country. The amount of opium raised in Turkey fluctuates. Only once or twice during the last forty years has the entire production of all Turkey exceeded 8,500 cases, while in many years it has not reached 4,000 cases. In 1907 that production was only 2,300 cases. It is estimated that an average crop of poppy will yield five to six thousand cases. It is probable that sufficient poppy seed is annually sown in Turkey to produce one hundred thousand cases of opium. But it is a very susceptible crop; too much or too little rain, too early or tardy showers, frost, cold, wet, drought, locusts and other pests, either singly or jointly, play havoc with it.

The Turkey opium has always been a high-grade opium, containing a large percentage of morphia, and for that reason it passes largely to Europe or America, to be used for medicinal purposes. A very small quantity only — and that a low grade — enters into the Far Eastern trade, to be ultimately manufactured into smoking opium. As in other opium producing countries, the poppy has another value aside from the opium which it yields. Poppy seed is a staple nourishment of all the poorer classes, and its oil furnishes them with light. The seed is made into cakes, and is a regular article of diet. When the oil is extracted from the seed, the residue passes as a food for cattle in the winter months. Latterly, the Turkish government has encouraged the growth of the poppy by exempting for a period of three full years all dues and taxes of new localities in which the poppy is raised. In 1905 the value of the opium export amounted to 730,000 pounds Turkish, from which the government derived a small revenue from an export tax. As the Turkish government publishes neither accounts nor estimates of revenue and expenditure, it is impossible to state the revenue tariff from opium. Turkey, like Persia, has no treaty relations with China, and the Chinese are in position to contract for, or forbid any traffic in opium. It will be pointed out later how the traffic is now restricted, and must cease by 1917 (*vide* SUPPLEMENT).

SIAM

The poppy is not grown in Siam. The crude drug is imported from India, and was until recently manufactured and distributed through an opium farm which the government sold to the highest bidder. For the last twenty years the importation or sale has been a government monopoly.

It has been mentioned under "The United States" that broad rights of importation and trade with Siam were granted to American citizens by the treaty of 1833, but that an exception was made of opium. The Siamese government derives a large part of its revenues from the manufacture and sale of smoking opium. In 1901 and 1902 the revenue was 14.2 per cent. of the total, and 1902–3 18.08 per cent.

LAST PHASE OF THE OLD ANTI-OPIUM AGITATION

The last phase of the old agitation against the Indian opium traffic was the publication of the report of the British Royal Commission on opium. That commission concluded its labors and report in 1895. The commission was the result of a prolonged battle both within and without the walls of Parliament. By those who accepted its conclusions it was thought that the anti-opium commotion was ended. It was intended that the commission should be judicial in character, but the evidence was taken and reported on in such a manner that it entrenched the Indian opium revenue as never before. It made nothing of the arguments and pleadings against the Indian opium traffic which were the immediate causes of its birth, and it exalted the Indian opium revenue to a position from which it did not seem likely to be dethroned. There even seemed to be some narcotic principle in the report itself which had a soporific effect on the leaders of the anti-opium movement. For they, too, ceased to trouble except sporadically and weakly, and the entire question fell to the *hinterland* of the world problems.

India continued to produce vast quantities of opium, practically useless for medical purposes. Its opium revenue was saved for a time at least, and its merchants continued to buy at the Calcutta and Bombay markets, and to send the drug not only to China but to other Oriental countries. Wherever there was a Chinese population, there Indian opium gravitated. The United States, Canada, Australia, as well as China, continued to be large buyers of the drug. The Royal Commission Report was the last official act of the British government to solve the opium problem until the new movement against it was initiated in 1903 and 1904. Lord Morley's opinion of the Royal Commission's Report is worth quoting:

> He did not wish to speak in disparagement of the Commission, but, somehow or other, its findings had failed to satisfy public opinion in Great Britain, and to ease the conscience of those who had taken up the matter. What was the value of medical views as to whether opium was a good thing or not when we had the evidence of nations who knew opium at close quarters. The Philippine Opium Commission, in the passage of their report which he hoped the House of Commons would take to heart, declared that the United States so recognized the use of opium as an evil for which no financial gain could compensate, that she would not allow her citizens to encourage it even passively.

Lord Morley's statement was made in May, 1906, while he was still in the House of Commons — that is, after the new movement against the misuse of opium had been initiated by the publication of the Philippine Report.

It will be observed from the foregoing rapid survey of the question that Turkey, Persia, India, and China are the great producers of opium. The Turkish opium is used largely in the West, ostensibly for medical purposes, but Persian and nearly all of the Indian and Chinese product went to supply a great vice. Trade in the drug was sacrosanct under treaties and other international pacts, and China, not being in full possession of her sovereign rights, was compelled to receive any and all opium sent to her from India. Her own treasury was enriched by a tax on the home production that seemed to be beyond control and by a duty on that imported from India and other countries. The Indian exchequer was largely maintained by the income from her opium monopoly and the transit tax on the drug passing from the native states to British Indian territory. Morphia, the chief alkaloid of opium, had reached China, the Crown colonies of Great Britain, and India. The use of it had become widespread and had added a new terror to the opium problem. But from 1904 onwards, a rapid development of public opinion took place all over the world, and before the International Commission met at Shanghai, steps had been taken in the interested countries to control or prohibit the illicit and baneful use of opium.

THE RECENT ANTI-OPIUM MOVEMENT

It was debatable as to how far the British government would have gone in suppressing the excessive production of opium in India had not the whole opium problem assumed a new phase by the entrance of the United States into the larger affairs of the Far East, through the acquisition of the Philippines. Those who see no good in the American occupation of the islands should take comfort out of the fact that because the United States too had a vast problem there, it gave new life to the anti-opium movement, and took the initial step to raise the Indo-Chinese Opium Question from its narrow national confines, and place it squarely before the international world for discussion and final settlement.

On taking over the Philippines, it soon became apparent to the government that opium smoking amongst the Chinese population of the islands was a widespread evil, and that the vice was spreading to certain of the native Philippine population. Whole communities of natives had abandoned themselves to the practice, and as a consequence had utterly ruined themselves in health and fortune. The government promptly took the question in hand and preliminary discussions were entered upon in 1902. There were many conflicting views, and the question threatened to become confused. The government then determined to investigate thoroughly, by a commission, not only the Philippine opium problem, but the entire problem as it then existed in the Far East. The commission was named in 1903. It visited Japan, China, French Indo-China, Formosa, Java, the Strait Settlements, and Burmah. The result was a most comprehensive, illuminating, and judicial report. It led to restrictive measures and finally to the total prohibition of the importation of opium into the Philippines except for medicinal purposes. The prohibitive legislation went into effect March 1, 1908. The Philippine Opium Commission reported in June, 1904, or just nine years after the report of the British Royal Commission. The effects of the two reports were entirely different. The Royal Commission Report suppressed discussion of the opium problem. The Philippines Report gave to it a renewed impetus. It aroused afresh the world's interest in the problem. The Philippines Report was extensively distributed throughout China. Its effect was to revive in the minds of those Chinese interested in suppressing the opium vice hopes and desires that had slumbered for nearly ten years. A new movement was immediately inaugurated by several Chinese leaders to stamp out the opium traffic.

The two most prominent leaders in the renewed effort of China were Their Excellencies Yuan Shi Ki and Tong Shao Yi. In the summer of 1906 Mr. Tong visited India, and as Sir John Jordan, the British Minister to Peking, states in a despatch of September 30, 1906,

> His Excellency, Tong Shao Yi seems to have been much impressed by the views he heard expressed on the subject of opium during his

recent visit to India. From conversations which he had with Mr. Baker, the financial secretary, and other members of the government of India, His Excellency came to the conclusion that India was prepared to dispense with the opium traffic. On his return to China, he informed his own government that it was the Chinese craving for the drug, and not England's desire to force it upon China which was now responsible for the continuance of the traffic. Mr. Tong could supply little information as to the steps which China proposed to take to suppress the opium habit. He seemed, however, to think that there would be a gradual reduction of the area of cultivation of native opium *pari passu* with a corresponding decrease in the import of the foreign article. Smokers of the drug, if officials, were to be given a term of about six months in which to break off the habit, and the ordinary people were to be dealt with on a time scale graduated according to the degree in which they may have become addicted to the habit.

Shortly before Mr. Tong's visit to Calcutta, a remarkable debate had taken place in the British House of Commons, after the long period of inattention to the opium question which followed the publication of the Report of the Royal Commission. The subject was brought up for discussion on the 30th of May, 1906, when Mr. Theodore Taylor moved "That this house reaffirms its conviction that the Indo-Chinese opium trade is morally indefensible, and requests His Majesty's government to take such steps as may be necessary for the bringing it to a speedy close." Part of the speech of Mr. Morley, the Secretary of State for India, on this resolution, has been quoted,[21] and it will be seen that the publication of the Philippine Report influenced him considerably. This resolution was carried *nem con* and the Chinese government most naturally construed it as an invitation to them to prove the sincerity of their desire for the cessation of the import of Indian opium. Almost coincident with Mr. Tong's visit to Calcutta and the House of Commons resolution, the Right Rev. Charles H. Brent, who had been a member of the Philippine Opium Commission, and had since the publication of the Report been closely watching the opium problem in the Far East, wrote to President Roosevelt calling his attention to the new movement against opium. In that letter he suggested that the moment was opportune, considering her interests in the

[21] *Supra*, p. 668.

Philippines, and the stand she had taken there, for the United States to call for some international action in regard to the opium traffic. The matter was promptly taken up by the State Department, and on the 17th of October, 1906, the American Ambassador to Great Britain informed Sir Edward Grey that,

> The American government was much concerned with regard to the question of opium which had been raised in connection with the Philippines, and that he was instructed to ask me what view we should take for a commission for the joint investigation of the opium trade and the opium habit in the Far East, to be undertaken by the United States, Great Britain, France, the Netherlands, Germany, China and Japan — that is by those countries having territorial possessions in the Far East.[22]

Sir Edward Grey replied that he could not tell him at once, but that, though an interference with the import of opium into China would involve a great sacrifice of Indian revenue, that would not prevent the government from considering the question or imposing some sacrifice, if it was clearly proved that the result would be to diminish the opium habit. The Chinese were understood to contemplate measures for stopping or restricting the importation of opium in China, and if they were really to be taken, it would be a thing which Great Britain should encourage.[23] After a considerable diplomatic correspondence, the above mentioned governments signified their willingness to join the United States in a joint investigation of the opium problem, and January 1, 1909, was appointed as a date for the meeting of the International Commission at Shanghai. The original idea was that the opium traffic and habit as it existed in the Far East, was to be investigated. But during the passage of the diplomatic correspondence it developed that the opium habit was no longer confined to Far Eastern countries, and that the United States especially had become contaminated through the presence of a large Chinese population. Further, that the morphine habit was rapidly spreading over the world. It was also seen that as Turkey and Persia were large producers of opium, it would be necessary to invite them into the Commission if the subject was to

[22] China, No. 1, 1908.
[23] *Idem.*

be thoroughly ventilated. Portugal was also a factor in the situation, through the possession of her colony of Macao, on the China coast, where considerable quantities of crude opium were annually imported from India, converted into smoking opium and shipped to the United States, Canada, and Mexico. Siam, though having no treaty relations with China, was nevertheless a factor in the problem, on account of her long established government monopoly for the manufacture and distribution of smoking upium; Russia also, because of her contiguity to China. Although neither Austro-Hungary nor Italy had territorial possessions, except concessions in the Far East, yet it was thought desirable that they should enter the Commission. Upon the development of the fact (as the result of the work of the American Opium Commission in 1908), that the opium question was no longer a question concerning Oriental peoples, it was decided to widen the scope of the work of the Commission, so that it should include reports on the home states of the various countries concerned, as well as on their territories and possessions in the Far East. This programme was notified to the various countries concerned in July, 1908, and they were asked to have a report prepared on the opium question as it affected the home states as well as their Far Eastern possessions, so that it might promptly be laid before the Commission as a whole when it met at Shanghai. As a result of the broadening of the scope of the International Commission, Austria-Hungary, Italy, Siam, Persia, Turkey, and Portugal, were invited into the Commission. Turkey failed to send a representative, but in all thirteen nations were represented at Shanghai when the Commission met. Owing to the death of the Empress Dowager and the Emperor of Japan, the Commission was postponed to the 1st of February, 1909.

HAMILTON WRIGHT.

(The second part of this article will appear in the October JOURNAL.)

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THE THIRD ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Pursuant to the announcement made in the January issue of the JOURNAL, the American Society of International Law held its third annual meeting at Washington, Friday and Saturday, April 23 and 24, 1909, at the New Willard Hotel, closing with the annual banquet, at which one hundred and twenty-three members and guests were present. The program committee attempted to give continuity to the proceedings and by selecting the speakers carefully in advance to maintain the high standard of the first two meetings. How far the committee was successful in its endeavors will appear from the Proceedings of the Third Annual Meeting, now in press.

The program may conveniently be divided into three parts. First,

the discussion of arbitration as a judicial remedy and the consideration of the principles upon which a permanent judicial court of arbitration shall be based; secondly, the nature and definition of political offence in international extradition; and thirdly, the development of international law by judicial decisions in the United States. In addition three subjects of special and timely interest were called to the attention of the Society; (1) the results of the Naval Conference of 1908–1909, at London, by Rear Admiral Stockton, a delegate plenipotentiary at the Conference; and Rear Admiral Sperry, a delegate plenipotentiary at the Second Hague Conference; (2) an account of the labors of the International Opium Commission which met at Shanghai, February 26, 1909, with an explanation of the importance of the nine resolutions adopted thereby, and the effort to control the opium market in the interest of the world, by Dr. Hamilton Wright, one of the American delegates to the commission; (3) a carefully prepared paper upon "American International Law" by Señor Alejandro Alvarez, legal adviser to the Chilean ministry of foreign affairs, in which the author summarized the results developed at great length in his admirable article printed in the April issue of the JOURNAL.[1] If it be technically correct to say that there is an American International Law, it is eminently proper to insist that there is an American as distinct from a European policy and the connection between international law and international policy is too apparent to escape the reader's notice. As indicative of the great interest Señor Alvarez takes in the scientific recognition of his thesis, it should be stated that he made the trip from Chile to Washington in order to attend the meeting of the Society.

Without describing in detail the proceedings or attempting to give a survey either of the papers within each group or of the conclusions reached by the speakers of each group, it should be said that the consensus of opinion was that arbitration as practiced in the last hundred years has not always been a judicial remedy, that the composition of the mixed tribunal in which nationals of the litigating parties sit, that the temporary nature of the tribunal called into being for a case and passing out of existence with its decision, prevent the development of a compact body of international precedent; that both the composition of the tribunal and its temporary nature have failed to maintain a continuity in the development of arbitral jurisprudence. It was evident both to the

[1] P. 269.

speakers and the meeting that arbitration might be made a judicial remedy and the papers read on Saturday morning indicated the establishment of a permanent court of arbitration composed of a limited number of judges instead of diplomats, as the sure and certain means of rendering arbitration judicial in fact as well as in theory. The Supreme Court of the United States was referred to as a possible model for a court which it is hoped may do the same for forty-six nations that the Supreme Court does for forty-six states of the American union. Enlightened public opinion insists upon the establishment of a court and there is no doubt that its constitution would be hailed as a veritable triumph for law and justice. Were it possible to assign to each independent nation a judge the court might spring into being over night. As, however, the number of judges must be limited some states will of necessity fail to be represented in the court, and the difficulty is to devise a method of composition which shall neither question the juridical equality of states nor wound the susceptibility of the states not represented in the court at any particular time. The doctrine of the equality of states as having a close bearing upon the composition of the court was discussed at considerable length as will be seen from the proceedings.

It can not be said that any definite conclusion was reached in the matter of political offence, but the discussion was valuable for the fact that the theory of extradition was examined with great care, the practice of the United States set forth historically and justified; and the views which would eliminate on the one hand and on the other enlarge political offence were presented to the meeting and discussed by its members on the floor.

The session on Friday evening showed conclusively that at least in the United States international law is regarded as an integral part of our municipal law and that questions arising between individuals and nations susceptible of judicial treatment had been repeatedly passed upon by our courts. It was shown by an analysis of cases that the Supreme Court of the United States and the Court of Claims have argued, debated, and decided a great variety of cases involving international law, to such an extent that the decisions of these two courts form no inconsiderable source of modern international law. These judgments, recognized alike by writers of authority and foreign governments, as correctly interpreting the law of nations, show beyond the possibility of criticism or controversy that international law is susceptible of judicial treatment, and that it,

like any branch of municipal law, may be logically and consistently developed by courts of justice. The usefulness if not absolute necessity of an international court, in which nation may sue nation, or appear on behalf of their subjects or citizens, was clearly demonstrated. The law of nations is in its very nature international and while it may be and often is, treated from a national standpoint, it is nevertheless to be regarded as a universal system binding upon nations by the mere fact that they are members of the international community. It may be, however, that nations would be more willing to establish an international court, to interpret a body of existing, clearly defined and ascertained law, than to entrust to an untried international court the codification of the law of nations. Great Britain was unwilling to accept the recent Hague Convention establishing the court of prize unless the law to be administered by it was ascertained in advance and for this purpose called a conference to consider maritime international law. The Declaration of London, signed on February 26, 1909, codifies in a wholly acceptable manner existing and divergent practice. The American Society of International Law felt that a great step would be taken in advance to secure the establishment of an international court of arbitration if the law to be administered by this august tribunal was codified. A resolution to this effect was therefore presented and adopted, and it is to be hoped a definite aim and purpose thus given to the society, will result in a codification worthy of acceptance:

Whereas the arbitration of questions of a legal nature between nations is recognized as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle; and

Whereas the establishment of a permanent court of international arbitration is predicated upon principles of justice universally recognized; therefore, be it

Resolved, that the President of the American Society of International Law shall appoint a committee of seven members, of which he shall be ex officio the chairman, to report to the annual meeting of this society in 1911 a draft codification of those principles of justice which should govern the intercourse of nations in time of peace; and make a preliminary report, if possible, in 1910, and sufficiently in advance of the meeting to be a subject of discussion at the Fourth Annual Meeting.

The third annual banquet on Saturday evening was presided over by Mr. Root, as toastmaster, and the Attorney General, Hon. George W. Wickersham; Messrs. Lyman Abbott, Samuel J. Elder, Robert S. Woodward, and General Horace Porter, spoke.

THE CHICAGO NATIONAL PEACE CONGRESS

The second National Peace Congress, that which assembled in New York in April, 1907, being the first, was held at Chicago, May 3, 4, 5, 1909. The congress brought together delegates from 32 states, mostly those of the middle west and the south, and had a total membership of about 560 delegates. Invitations were sent to peace societies, philanthropic associations, educational institutions, business organizations, cities and states — the best response coming from mayors and governors — but the predominant influence in the convention was exercised by college professors and presidents, who joined heartily with the specialists in the peace cause and students of international law in making the program of the congress comprehensive and informing. The Chicago Congress, though lacking in the picturesque episodes that marked the New York Congress, such as the presentation of the peace flag to Mr. Carnegie, and the visit of the distinguished company of scholars from Oxford and Cambridge who had come to it from the dedication of the Carnegie Institute, together with the presence of Baron d'Estournelles de Constant, whose cordial international greeting will long be remembered, registered great progress in teaching the principles of peace and internationalism. The body of delegates showed an intelligent appreciation, even of technical subjects treated in the speeches, and gave evidence that since the meeting two years ago, and especially since the publication of the proceedings of the Hague Conference in the press, there has been a commendable increase in America in that "popular understanding of international law," the importance of which was urged by Senator Root in the first number of this JOURNAL.

May 1st, the Saturday preceding the congress, a meeting of teachers was held at which it was shown that there are now two organizations in the schools for the teaching of the principles of peace — the American School Peace League and the Young Peoples International Federation League. Sunday, May 2d, the peace movement was made the theme of sermons in the various churches, religious societies and colleges of Chicago. In the evening a mass meeting was held, under the auspices of the Sunday Evening Club, the speakers being Rev. Robert J. Burdette, Rabbi Hirsch, Dr. Jones and President Schurman of Cornell University. Their general topic was the importance of changing the emphasis in popular ideals from the heroism of war to the heroism of peace.

The opening session of the congress proper began on Monday afternoon, the 3d, in Orchestra Hall. Hon. Robert Treat Paine of Boston,

president of the American Peace Society, was in the chair. Addresses of welcome were made by Hon. Charles S. Deneen, Governor of Illinois, and others. Hon. Jacob M. Dickinson, the president of the congress, was unable to attend, but the speech prepared by him for the occasion, the subject of which was "The Progress of Peace," was printed in the May number of the "Advocate of Peace" before the congress opened. President Taft, the honorary president of the congress, who was also unable to be present, sent a letter in which he spoke of the important part taken by the United States as a peacemaker and conciliating friend among the nations, and assured the delegates that the influence of his administration would be exerted to the utmost in the promotion of the peace cause. Dean W. P. Rogers of the Cincinnati Law School, in an address on the "Dawn of Peace," gave an account of the development of private law and expressed the opinion that there was nothing in the relations of the nations to which the general principles of law could not equally apply as to the relations of individuals. Dr. Benjamin F. Trueblood, secretary of the American Peace Society, spoke on "The Present Position of the International Peace Movement." He reviewed briefly the advance made by the movement since its beginning in 1809, especially from the point of view of the settlement of questions by arbitration. He remarked that,

> Arbitration is no longer an experiment. It is the settled practice of the nations. A score of disputes to-day go naturally to arbitration where one gives rise even to talk of war.

Commenting on the work of the two Hague Conferences he said that although the Permanent Court of Arbitration at The Hague was a substitute for war practically, if not theoretically, adequate for the adjustment of all international disputes, a step of still greater moment was taken by the second Hague Conference for a more perfect substitute for force in the settlement of international differences when it voted for the principle of "an international court of arbitral justice, with judges always in service and holding regular sessions." He believed that the high-water mark of the work of the second Hague Conference was reached when, by providing for a third Hague Conference, it practically adopted the principle of holding periodic meetings of the conference in the future.

The topic "The Drawing Together of the Nations," the subject of Monday evening's meeting, was dealt with in addresses by Rev. H. T. Kealing of Nashville, Tennessee, Professor Paul S. Reinsch of the Uni-

versity of Wisconsin, and President David Starr Jordan of Leland Stanford, Jr., University. This was the widest departure of the week from the point of view of diplomacy and international law or business interests, from which the peace movement was frequently considered by the congress. The interdependence of nations, the progress of the colored race in America, and the biology of war, each had its place. On the same evening at a special meeting in Music Hall, presided over by Miss Jane Addams, addresses were made by Joseph B. Burtt of Chicago on "Fraternal Orders and Peace," Professor Graham Taylor on "Victims of War and Industry," and Samuel Gompers on "Organized Labor and Peace." It was shown that the interests of labor and industry were both identified with peace. Professor Taylor made the point that the blind and unconscious forces of industry were just as actively and effectively at work for the cause as those which are directed and organized consciously for that end.

A session of the congress was given up the next morning to the business men, at which the relation of commerce and peace was considered. Hon. George E. Roberts, President of the Commercial National Bank of Chicago, presided. The speakers were W. A. Mahoney of the Chamber of Commerce, Columbus, Ohio; Hon. James R. Arbuckle, consul of Spain and Colombia at St. Louis, Mo.; Marcus M. Marks of New York, President of the National Association of Clothiers, whose paper was read by Rev. Charles E. Beals; Hon. Joseph Allen Baker, member of the House of Commons; and Mr. Harlow N. Higinbotham. At this meeting the prevailing opinion was that the prosperity of commerce was dependent upon a settled condition of international peace and protest was made against further increase of armaments or the settlement of international questions by force. Mr. Higinbotham proposed that in future expositions the engineries of war should not be exhibited. Mr. Baker appealed to the congress to use its influence to get the United States to take a step in the direction of limiting armaments, since the powers of the old world, owing to mutual suspicions and traditional prejudices, were unable to take the initiative themselves. Mr. Baker's appeal had great weight with the congress and found expression later in the platform of resolutions.

A special session of the congress was given to legal aspects of the peace movement. Professor William I. Hull of Swarthmore College spoke on "The Advance Registered by the Two Hague Conferences;" and Prof. Charles Cheney Hyde of Northwestern University on "Legal Problems

Capable of Settlement by Arbitration." Both writers presented papers which will remain among the most valuable contributions to the literature of the congress. Hon. James Brown Scott, Solicitor of the Department of State, Washington, D. C., was unable to be present. His paper, which was entitled, "Some Question Likely to be Considered by the Third Hague Conference" was read by Mr. James L. Tryon, Assistant Secretary of the American Peace Society. This paper made an interesting event in the congress in connection with the speech that followed immediately afterward by Hon. William I. Buchanan, who discussed the attempt made by the Second Hague Conference to establish a court of arbitral justice, a real high court of the nations. Among the next steps forward Dr. Scott included: (1) a world treaty of obligatory arbitration; (2) the establishment of a Court of Arbitral Justice, perhaps making it the same in its constitution as the International Prize Court by giving that court civil as well as prize jurisdiction; (3) making the Hague Conferences periodic, and (4) regulating the status of foreigners in belligerent territory, particularly in reference to military charges laid upon them. Great applause was called forth when it was suggested by Dr. Scott that by the time the Third Hague Conference meets Germany may be ready heartily to join the majority of the nations in a world arbitration treaty.

"The Next Steps in Peace Making," the general topic of the Tuesday evening meeting, was in close sequence to that of the afternoon, but was treated almost entirely from the point of view of the limitation of armaments, strong speeches on behalf of limitation being made by Dr. Jones, Edwin D. Mead and Hon. Richard Bartholdt, whose sentiments were warmly applauded by the congress. At this meeting Mr. Edwin M. Ginn of Boston spoke on his proposed School of International Peace.

On the same day an Intercollegiate State Oratorical Contest was held at the University of Chicago, a Woman's Meeting, at which Mrs. Lucia Ames Mead was the principal speaker, and a meeting at which Hamilton Holt of the New York "Independent" gave a popular stereopticon lecture on world federation. Professor S. P. Brooks of Baylor University, Texas, the organizer of the State Peace Congress of 1907, presided at the latter meeting.

The business session of Wednesday morning was spent in the adoption of a platform of resolutions and in listening to a symposium of addresses by different workers in the peace movement on its progress within their own field.

The event of the week was the visit on Wednesday afternoon by Dr. Wu Ting Fang, the Chinese Ambassador, and Count von Bernstorff, the German Ambassador, representatives of the British, French and Japanese Embassies, and Hon. Richard A. Ballinger, Secretary of the Interior. Mr. Ballinger expressed warm interest in the peace cause and made a plea for a higher conception of international citizenship — an earnest desire for which the United States had shown in its efforts to promote the success of the Hage Conferences and the Hague Court. Hon Richard Bartholdt presided at this meeting.

The congress closed with a banquet at the Auditorium Hotel and the Auditorium Annex at which the distinguished speakers of the afternoon were reinforced by Hon. James A. Tawney, General Frederick D. Grant, and others. At this banquet the announcement was greeted with applause, that Hon. John R. Lindgren, Swedish Consul of Chicago, had presented Northwestern University a fund of $25,000 for the promotion of international peace and interdenominational religious fellowship by regular courses of lectures and other means.

The platform of the congress is given below, the preamble being omitted:

Resolved, by this second United States national peace congress that public war is now out of date, a relic of barbarism unworthy of our time, and that the nations of the world by joint agreement, by a league of peace among themselves, ought to make its recurrence hereafter impossible.

Resolved, that no dispute between nations, except such as may involve the national life and independence, should be reserved from arbitration, and that a general treaty of obligatory arbitration should be included at the earliest possible date. Pending such a general treaty, we urge upon our government and the other leading powers such broadening of the scope of their arbitration treaties as shall provide, after the example of the Danish-Netherlands treaty, for the reference to The Hague court of all differences whatever not settled otherwise by peaceful means.

Resolved, that the prevailing rivalry in armaments, both on land and sea, which imposes such exhausting burdens of taxation on the people, and is the fruitful source of suspicion, bitter feeling, and war alarms, is wholly unworthy of enlightened modern nations, is a lamentable failure as a basis of enduring peace, and ought to be arrested by agreement of the powers without delay.

Resolved, that this peace congress expresses its high appreciation of the action of our government in the recent conclusion of twenty-three arbitration treaties, and in the promotion of friendly relations between the various American republics. It recognizes with special satisfaction what was done by our government and representatives at the second Hague conference in behalf of a general treaty of obligatory arbitration, a court of arbitral justice, the immunity of private property at sea from capture in time of war, and the establishment of a periodic congress

of the nations, and in support of the proposition of the British government for limitation of armaments. It respectfully and urgently requests the President and the Congress of the United States to take the initiative, so far as practicable, in an endeavor to complete the work of the Second Hague Conference in these various directions, and especially to secure an agreement among the military and naval powers for a speedy arrest of the ruinous competition in armaments now prevailing. As an immediate step to this end, we urge our government, in obedience to the charge of the Second Hague Conference, as well as the first, that all nations should earnestly address themselves to this problem, to create a special commission of the highest character for its consideration, whose report shall serve as a basis for the action of our delegates at the Third Hague Conference.

Resolved, that this congress earnestly indorses the movement so auspiciously begun by the governments of Denmark and Great Britain to provide at public cost for constructive measures to promote international good understanding, hospitality, and friendship, and appeals to our own government for broad and generous action upon these lines.

Resolved, that this congress, representing all sections of our great country, appeals to our churches, schools, and press, our workingmen's and commercial organizations, and to all men of good will, for increased devotion to this commanding cause and such large support of its active agencies as shall strongly advance the great measures which are to come before the next Hague Conference, and shall maintain our nation in high and influential leadership in behalf of international justice and order.

THE FIFTEENTH LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION

The fifteenth annual Lake Mohonk conference on international arbitration met at Lake Mohonk, Ulster County, N. Y., May 19, remaining in session till May 21, 1909. The meeting, well attended and enthusiastic, has a two-fold claim upon the public at large: first, by reason of the remarkable, powerful, and thoughtful address of its chairman, Dr. Nicholas Murray Butler, president of Columbia University; and second, because of the platform adopted by the conference, which is sanity itself. It is to be regretted that space does not permit the JOURNAL to print in full President Butler's address, outlining as it does the progress made within the last few years and the causes which threaten the world's peace at the present day, which President Butler found to be the strained relations between Great Britain and Germany, based upon a misunderstanding of each other's motives. Part of Dr. Butler's address follows:

The history of the second Hague Conference is still fresh in our minds. Although not everything was done that we had hoped for, yet when the cloud of

discussion lifted, we could plainly see that long steps in advance had been taken, and that there was coming to be a more fundamental and far-reaching agreement among the nations as to what was wise and practicable in the steady substitution of the rule of justice for the rule of force among men.

To-day, however, the most optimistic observer of the movement of public opinion in the world must confess himself perplexed, if not amazed, by some of the striking phenomena which meet his view. Edmund Burke said he did not know the method of drawing up an indictment against a whole people; but perhaps it may be easier to detect emotional insanity than to draw up an indictment for crime. The storm-center of the world's weather to-day is to be found in the condition of mind of the English people. The nation which for generations has contributed so powerfully to the world's progress, appears to be possessed for the moment with the evil spirit of militarism. It is hard to reconcile the exaggerated utterances of responsible statesmen in Parliament and on the platform; the loud beating of drums and the sounding of alarms in the public press; and the flocking of the populace to view a tawdry and highly sensational drama of less than third-rate importance for the sake of its contribution to their mental obsession by hobgoblins and the ghosts of national enemies and invaders, with the temperament of a nation that has acclaimed the work of Howard, Wilberforce and Shaftesbury, and whose public life was so long dominated by William Ewart Gladstone.

What has happened? If an opinion may be ventured by an observer whose friendliness amounts to real affection, and who is in high degree jealous of the repute of the English people and of their place in the van of the world's civilization, it is that this irrational and emotional outburst is attendent upon a readjustment of relative position and importance among the nations, due to economic and intellectual causes, which readjustment is interpreted by the English in terms of the politics of the first Napoleon rather than in terms of the politics of the industrial and intelligent democracies of the twentieth century. Germany is steadily gaining in importance, and England is in turn losing some of her long-standing relative primacy. The causes are easy to discover and are in no just sense provocative of war or strife. Indeed, it is highly probable that war, if it should come, would only hasten the change it was entered upon to prevent.

Within a generation the pressure of German competition has been severely felt in the trade and commerce of every part of the world. The intensive application of the discoveries of theoretical science to industrial processes has made Germany, in a sense, the world's chief teacher in its great international school of industry and commerce. With this over-sea trade expansion has gone the building of a German navy. It appears to be the building of this navy which has so roused the passions of the English people. For the moment, we are not treated to the well-known paradox that the larger a nation's navy the less likely it is to be used in combat and the more certain is the peace of the world. The old Adam asserts himself long enough to complain in this case that if a navy is building in Germany it must be intended for offensive use; and against whom could the German people possibly intend to use a navy except against England?

One must needs ask, then, what reason is to be found in the nature of the

German people, in the declarations of their responsible rulers, or in the political relations between Germany and any other nation, for the belief that the German navy alone, among all modern navies, is building for a warlike purpose? Those of us who feel that the business of navy-building is being greatly overdone may well wish that the German naval program were much more restricted than it is. But, waiving that point for the moment, what ground is there for the suspicion so widespread in England against Germany, and for the imputations to Germany of evil intentions toward England? Speaking for myself, and making full use of such opportunities for accurate information as I have enjoyed, I say with the utmost emphasis and with entire sincerity that I do not believe there is any ground whatever for those suspicions or for those imputations. Nor has adequate ground for them been given by any responsible person.

Are we to believe, for example, that the whole public life in both Germany and England is part of an opera bouffe, and that all the public declarations of responsible leaders of opinion are meaningless? Is there no truth and frankness and decency left in the world? The whole idea is too preposterous for words, and it is the duty of the thoughtful and sincere friends of the English people, in this country and in every country, to bring them to see the unreasonableness, to use no stronger term, of their present national attitude. If justice be substituted for force, England will always be safe.

The greatest present obstacle to the limitation of the armaments under the weight of which the world is staggering toward bankruptcy; the greatest obstacle to carrying forward those social and economic reforms for which every nation is crying out, appears to me to be the insistence by England on what it calls the two-power naval standard. It will be observed that in computing the so-called two-power standard, the English jingoes count as contingent enemies the French and Japanese, with both of whom their nation is in closest alliance, and also the Russians, with whom the English are now on terms of cordial friendship. In other words, unless all these treaties of alliance and comity are a fraud and a sham, the two-power standard of England is directed solely at Germany. By the maintenance of this doctrine under the circumstances it is, I profoundly regret to say, the English who become the aggressive party in this international debate, and it is the English who must retreat from the position into which they have drifted or been driven, before any more progress can be made in the organization of the world on those very principles for which the English themselves have time-long stood, and for whose development and application they have made such stupendous sacrifices and performed such herculean service.

It is difficult to see how any responsible English statesman who has read the majority and minority reports recently laid before Parliament by the Poor Law Commission, can for one moment turn aside from the stern duty of national protection against economic, educational and social evils at home to follow the will-o'-the-wisp of national protection against a non-existent foreign enemy. It is the plain duty of the friends of both England and Germany to exert every possible influence to promote a better understanding of each of these peoples by the other, and to point out the folly, not to speak of the wickedness, of permitting the seeds of discord to be sown between them by any element in the population of either.

The alternative to press upon the attention of mankind is that of huge armaments or social and economic improvement. The world cannot have both. There is a limit to man's capacity to yield up taxes for public use. Economic consumption is now heavily taxed everywhere. Accumulated wealth is being sought out in its hiding places, and is constantly being loaded with a heavier burden. All this can not go on forever. The world must choose.

Despite everything the political organization of the world in the interest of peace and justice proceeds apace. The movement is as sure as an Alpine glacier, and it has now become much more easily perceptible.

There is to be established at The Hague beyond any question, either by the next Hague Conference or before it convenes by the leading nations of the world, acting along the lines of the principles adopted at the second Hague Conference, a high court of international justice. It is as clearly indicated as anything can be that that court is to become the supreme court of the world.

The Interparliamentary Union, which has within a few weeks adopted a permanent form of organization and chosen a permanent secretary, whose headquarters are to be in the Peace Palace at The Hague itself — an occurrence of the greatest public importance — now attracts to its membership representatives of almost every parliamentary body in the world. At its last meeting, in Berlin, the Parliament of Japan, the Russian Duma, and the Turkish Parliament were represented. By their side sat impressive delegations from the parliaments of England, France, Germany, Austria, Italy, Belgium, The Netherlands, the Scandinavian nations, as well as eight or ten representatives of the American Congress. In this Interparliamentary Union lies the germ of a coming federation of the world's legislatures which will be established in the near future, and whose powers and functions, if not precisely defined at first, will grow naturally from consultative to that authority of which wisdom and justice can never be divested.

Where, then, in this coming political organization of the world is the international executive to be found? Granting that we have at the Hague an international court; granting that we have sitting, now at one national capital and now at another, what may be called a consultative international parliament, in what direction is the executive authority to be looked for? The answer to this vitally important question has been indicated by no less an authority than Senator Root in his address before the American Society of International Law more than a year ago. Mr. Root showed, as he readily could, that nations, day by day, yield to arguments which have no compulsion behind them, and that as a result of such arguments they are constantly changing policies, modifying conduct, and offering redress for injuries. Why is this? Because the public opinion of the world is the true international executive. No law, even a municipal law, can long be effective without a supporting public opinion.

In this same direction lies the highest hope of civilization. What the world's public opinion demands of nations or of international conferences, it will get. What the world's public opinion is determined to enforce, will be enforced. The occasional brawler and disturbed of the peace in international life will one day be treated as is the occasional brawler and disturber of the peace in the streets of a great city. The aim of this Conference, and of every gathering of like

character, must insistently and persistently be the education of the public opinion of the civilized world.

We Americans have a peculiar responsibility toward the political organization of the world. Whether we recognize it or not, we are universally looked to, if not to lead in this undertaking at least to contribute powerfully toward it. Our professions and our principles are in accord with the highest hopes of mankind. We owe it to ourselves, to our reputation and to our influence, that we do not by our conduct belie those principles and those professions; that we do not permit selfish interests to stir up among us international strife and ill-feeling; that we do not permit the noisy boisterousness of irresponsible youth, however old in years or however high in place, to lead us into extravagant expenditures for armies and navies; and that, most of all, we shall cultivate at home and in our every relation, national and international, that spirit of justice which we urge so valiantly upon others.

Immediately upon its delivery the address was given great publicity in the press and it can not be doubted that its circulation in Great Britain and Germany will have a great and a restraining influence upon responsible statesmen and the enlightened public.

The program adopted by the conference appropriately calls attention to the progress made in the ten years succeeding the meeting of the First Hague Conference, and then urges upon the government of the United States to take the initiative in giving effect to the various provisions and recommendations of the First and Second Conferences which still await adoption. Comment upon this admirable document is unnecessary, for it is well-night impossible to express in shorter, more intelligible, or better chosen terms, the needs of the present and immediate future. It reads as follows:

The Fifteenth Annual Lake Mohonk Conference on International Arbitration, meeting on the tenth aniversary of the opening of the first Hague Conference, reviews with profound satisfaction the signal advance of the cause of international justice during the decade, a progress unexampled in any previous period in history. The memorable achievements of this period are at once an inspiration and an imperative call to renewed effort.

We urge upon our government, which has been so conspicuously and so honorably identified with the progressive policies of The Hague, prompt action toward perfecting the important measures there inaugurated and the complete development of the system or arbitration. We especially urge its early initiative in the establishment of the International Court of Arbitral Justice.

We further urge the negotiation of a general treaty of arbitration between all nations, and look forward with increasing hope to the day when treaties of arbitration shall provide for the reference to The Hague of all international differences not settled by regular diplomatic negotiation.

The clear logic of the Hague conventions prescribes the limitation and gradual

reduction of the machinery of war by the nations parties to those conventions, corresponding to the development of the instrumentalities of law and justice for the settlement of international differences. The great armaments of the nations, whose intolerable burdens prompted the call to the first Hague Conference, have during the decade increased so portentously as to have now become, as recently declared by the British Foreign Secretary, a satire upon civilization. They fill the world with apprehension and alarm; they create an atmosphere unfavorable to the system of arbitration; and their drain upon the resources of the peoples has become so exhausting as to menace all national treasuries and disastrously check the social reforms and advances which the interests of humanity demand. It is the opinion of this Conference that the time has arrived for carrying into effect the strongly expressed desire of the two Peace Conferences at The Hague that the governments "examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets" and address themselves to the serious study of this pressing question. Accordingly we ask our government to consider whether the peculiar position which it occupies among the nations does not afford it a special opportunity to lead the way toward making these weighty declarations a basis of public and concerted action.

THE BALKAN SITUATION

The last chapter of the Balkan situation, which began in October, 1908, came to an end in March, when Servia, because of Russia's attitude of conciliation, accepted the annexation by Austria-Hungary of the provinces of Bosnia and Herzegovina as an accomplished fact, agreed to reduce to a peace footing its military forces, which it had been mobilizing throughout the winter, and formally declared that the action of the Vienna government furnished no ground for Servian complaint. Turkey had already accepted a substantial indemnity and certain concessions from Austria in lieu of the barren right of legal sovereignty over the annexed provinces. Bulgaria, through the good offices and assistance of Russia, had also come to an agreement with Turkey as to compensation for the loss of its suzerainty over Bulgaria and sovereignty over Eastern Rumelia. Thus the war-clouds, which gathered last autumn along the Danube and the northern Macedonian border, have been dispelled, and European interest in the Near East has been diverted from the Balkans to Constantinople, where the reactionary revolution so soon gave place to the counter-revolution of the Young Turks with the resulting deposition of Abdul Hamid II.

While the course taken by the Austrian government in proclaiming, without the consent of the powers, the annexation of Bosnia and Herzegovina was a direct violation of the Treaty of Berlin, the actual result

was not out of harmony with the spirit of its provisions. When Austria-Hungary was given in 1878 administrative authority over the *vilayets*, which had been so misgoverned by Turkey, it was a practical transfer of the *de facto* sovereignty to the dual monarchy, and it could hardly have been contemplated that the Sultan would ever again come into actual possession. When, however, the Young Turks' revolution of July, 1908, gave a constitution to the Ottoman Empire, by which the principle of representation in the imperial government and that of autonomy in local governments were decreed, the Bosnians and Herzegovinans, who from the first had been hostile to Austrian occupation, were in a position to demand the restoration of full sovereignty to reformed Turkey on the ground that their rights would be amply secured by representation in the parliament at Constantinople and by the institution of local self-government. Such a demand would have received the hearty support of the Young Turks and probably of Russia; and, in view of the declared grounds for Austrian occupation, it would have embarrassed the powers to refuse it.

It was doubtless on account of this probable action by the Bosnians and Herzegovinans and the uncertainty of what the determination would be in case a congress of Europe was called to consider the restoration of Turkish authority, that Baron von Aerenthal acted independently without giving preliminary notice of the intended annexation to the powers or waiting to obtain their consent.

Bulgaria was placed in a very similar condition in regard to Eastern Rumelia, although the inhabitants of the latter being chiefly Bulgars would have undoubtedly opposed any attempt of the Young Turks to give them representation in the Turkish parliament and autonomous government under the new constitution. Bulgaria, as a vassal state of Turkey, was in no position to complain if Eastern Rumelia was given constitutional government, hence a declaration of independence was necessary to retain control over the province south of the Balkan range. To allow the powers to decide whether Bulgaria should be independent and should include within its boundaries Eastern Rumelia was too uncertain a course for Prince Ferdinand to pursue in view of the conflicting interests involved. Like Austria, therefore, and undoubtedly acting upon a mutual understanding with that government Ferdinand proclaimed the freedom of his principality from Turkish suzerainty and assumed the ancient title of the Bulgarian Tzar.

At the time of the signature of the Treaty of Berlin Austria's sphere

of influence was extended over Bosnia and Herzegovina, and Russia's sphere was presumed to include Bulgaria. The present situation in the Balkans has in no way changed this balance between the two empires On that account there seems little ground for objection by the powers. But the method which was employed by Austria and Bulgaria, has hurt the *amour propre* of more than one European government, and caused a great deal of grumbling and complaint, though that has subsided and Europe has given its sanction to acts which have demonstrated how worthless the Treaty of Berlin is in restraining political action in the Balkan Peninsula.

The real causes of unrest in Southeastern Europe, however, still remain to vex the statesmen of the powers and to menace continental peace. These are the national ambitions and the national animosities of the different races of that region. Cavour declared nationality to be the most potent force in the political world of the nineteenth century, and the weakness of the Treaty of Berlin seems to lie in the fact that its authors failed to realize this truth.

The Serb, the Bulgar, and the Greek have for the past ten years endeavored to secure numerical supremacy in Macedonia, each one hoping that his country may fall heir to that fertile region, when the Turk withdraws across the Bosphorus. Each race in seeking to obtain the mastery of the Balkan Peninsula, and by doing so to become one of the powerful states of Europe. It is from this struggle of races, combined with the inefficiency of Turkish rule, that Macedonia has been for so long a land of lawlessness and outrage. And it was the blow to the ambition of the Servian people, who had hoped to unite their kindred, the Bosnians and Herzegovinans, in the "Great Servia" of the future, that caused the intense bitterness of the Serbs against Austria, when the provinces were annexed last October.

While Austria's triumph may for a time dishearten the Balkan Slavs, the racial conflict will undoubtedly be renewed, for behind the little kingdom and the Slav principality of Montenegro is the great Empire of Russia, which, when it has recovered from its defeat in the Far East and from its internal dissensions, will give its moral support and perhaps its strength to the cause of the southern Slavs.

Thus the Balkan Question remains an unsolved problem still, which the recent situation has in no way changed unless it is to introduce another contestant in the racial struggle for Southeastern Europe in the person of the Austrian.

THE CONSTITUTION OF SOUTH AFRICA

The South African Convention, which began its sessions in October, completed the draft of a Constitution for the Union on February 3, 1909. This draft was submitted to the Parliaments of the four South African colonies on the thirtieth of March, and was discussed by them throughout the month of April. Early in May, the Convention reassembled for the purpose of considering amendments suggested by the various parliaments. The final draft of the Constitution was passed on May 14, and was then again submitted to the individual parliaments for the purpose of having the latter pass the addresses for Union. The draft is then to be submitted to the British government and to be enacted in the form of law by the British Parliament. The Constitution will, therefore, not be submitted directly to the people of the South African colonies for adoption, although the colony of Natal has provided for a referendum on the question as to whether the colony is to become a member of the Union.

The new Constitution is founded in its general outline upon those of Australia and Canada, although it contains provisions introduced on account of the special circumstances of South Africa. The executive government is placed in the hands of a Governor-General and an Executive Council, as well as a cabinet of ten members, who are to administer the departments of state, and who are to be members of either house of parliament. The parliament itself is composed of two chambers, the senate and the house of the assembly. Each province shall elect eight senators, while the same number shall be nominated by the Governor-General in Council. One-half of the eight thus nominated "shall be selected on the ground mainly of their thorough acquaintance with the reasonable wants and wishes of the colored races in South Africa." The term of office of the senators is ten years. Provincial senators are elected by the Provincial Council of each province. The house of assembly is composed of members chosen directly by the voters of the Union. Fifty-one members are apportioned to Cape of Good Hope, seventeen to Natal, thirty-six to the Transvaal, and seventeen to the Orange Free State. It will be noted that the Orange River Colony is to reassume its old name of Orange Free State. A commission is provided for which is to divide each province into electoral divisions, each returning three or more members. The commissioners may give consideration to "community or diversity of interests, means of communication, physical features, existing electoral boundaries, and sparsity or density of population" in fixing the quota of electors, but they shall not depart from the purely

numerical ratio to a greater extent than fifteen per cent. In other words, they may to a certain extent take into account other than purely numerical data in arranging the representation of districts. It is provided that in case a deadlock between the senate and the house extends over two sessions, the Governor-General may convene a joint meeting of the members of both houses. In this joint session, the matter may be disposed of by all members voting together. Any law passed by the parliament may be disallowed by the Crown within a year after it has been assented to by the Governor-General.

The South African Union will differ from the United States in that the central government will not be one of enumerated powers, it being provided that "parliament shall have full power to make laws for the peace, order, and good government of South Africa." It is the powers of the provinces that are specifically delegated. They may be described as referring generally to all matters which are of merely local or private nature in the provinces, such as agriculture, municipal institutions, public works other than railways and harbors, markets, and game preservation. The chief official in the province is to be known as the Administrator. He is assisted by a Provincial Council, consisting of the same number of members as are elected by the Province for the house of assembly of the Union.

A supreme court is established, and it is provided that there shall be no appeal from the Supreme Court of South Africa to the King in Council, "but nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked." The Constitution also contains special provisions with respect to finance and the management of the state railways. The relations of the government to the subjects of non-European race are not dealt with in the Constitution, with the exception of the provision respecting four members of the senate. But the right of suffrage now accorded to negroes in Cape Colony shall not be taken away, unless there should be a two-thirds vote of the total members of both houses in favor of such a measure.

The Constitution improves upon the state of Rhode Island in the matter of capitals. The seat of the executive departments shall be at Pretoria, the parliament, however, will assemble at Cape Town, while the supreme court will hold its sessions at Bloemfontein. It seems un-

fortunate that an instrument, the provisions of which are in general so simple and direct, should contain an arrangement like this, which will cause unending difficulties in the administration of public business. Especially when we consider that the ministers of state are also members of parliament, the awkwardness of an arrangement by which they will be forced to flit back and forth between Pretoria and Cape Town during the legislative sessions, is apparent.

When this Constitution was submitted to the colonial parliaments, it was feared by many that the attempts to amend and improve would be fatal to the ultimate success of the movement for Union. The Transvaal lead the way by a unanimous approval. It was, however, in Cape Colony and Natal, where the feeling between the Boer and English elements is most tense, that the greatest difficulties presented themselves. Under the Constitution, perfect equality of electors is provided for. As is well known, the South African political arrangements hitherto have given greater weight to the rural electorates than to those in the city — which resulted to the advantage of the Boer element. Not only does the Constitution do away with this distinction, but in its original draft, it provided for proportional representation. Thus in every way were the rights of the minority guaranteed. These arrangements were not satisfactory to the Afrikander Bond in Cape Colony. The Cape government, therefore, asked for an amendment upholding the old distinction between rural and urban electorates, and the suppression of proportional representation. It was feared that on this rock the entire Constitution might be lost; yet, the Convention in its session in May succeeded in arriving at a satisfactory compromise. Proportional representation was restricted to the election of senators, and is not to be used in the election of members of the assembly. On the other hand, the equality of the electorates provided for by the original draft has been maintained. The suppression of proportional representation will strengthen the Boer element in the assembly, and in the case of a deadlock between the senate and the assembly, the larger numbers of the latter will have a great influence upon legislation. The Constitution in its present form is therefore looked upon by many as a distinct victory by the Boer element.

Looking, however, at the temper of the South African countries, as it expressed itself in the discussions of the last few months, it is pleasing to note the disappearance of racial animosities before the growing feeling of loyalty towards the idea of a great semi-independent South African Union. "Closer Union" Associations have been formed, and meetings

have been held all over South Africa, in which the great advantages of united national life have been set forth by the most representative speakers of the colonies. In a most statesmanlike way, the Convention has succeeded in avoiding certain difficulties and in compromising upon others, so as to lay before the people of South Africa a Constitution which can be accepted with a great deal of enthusiasm, although every detail may not be acceptable to every section in the country. In the creation of a great political union in South Africa, an important step in advance has been taken in the political organization of the modern world.

THE DAMIANO EXTRADITION CASE

In the course of 1908 one Vito Damiano was indicted in the state of New York for the crime of murder in the first degree, and it appearing that he had fled the country and was residing in Argentine, a request was made upon Argentine for the extradition of the fugitive in accordance with the extradition convention between the United States and Argentine Republic, signed September 26, 1896, proclaimed June 5, 1900. The Argentine authorities found probable cause for surrendering Damiano to the duly constituted American authorities, but insisted that the United States should apply to the prisoner in case of condemnation the punishment immediately inferior to the death penalty. According to Argentine law Damiano, upon conviction, would be subject to imprisonment for from ten to twenty-five years. The article of the treaty by virtue of which Argentine sought to impose this condition upon the surrendering of the fugitive is as follows:

> For the purpose of extradition the two high contracting parties will proceed, in accordance with this treaty, in conformity with the laws regulating judicial proceedings at the time being in force in the country to which the demand for extradition shall be directed.

If the expression "judicial proceedings at the time being in force" means that extradition is to take place according to the rules and regulations provided in each country no exception can well be taken to it unless it should prove to be inconsistent with the express language of the treaty. If, however, the expression is interpreted to mean that the punishment imposed upon conviction is to be in accordance with the substantive law in force in the country to which the demand for extradition shall be directed, the extradition treaty might be of little use because of

the differences between the punishment imposed by laws of the extraditing states. If again, the foreign government in the absence of an express treaty stipulation had the right to prescribe that the death penalty should not be inflicted the United States would be in an embarrassing position, because the fugitive is ordinarily returned to the state jurisdiction where the crime is committed and the federal authority can not bind the state authorities, and the states themselves would experience very great difficulty if they were obliged to bind themselves not to inflict the punishment which the facts showed the criminal deserved and the laws imposed.

Upon a statement of the difficulties involved the Argentine authorities reconsidered the matter, and on appeal to the Supreme Court of Argentine, extradition was ordered unconditionally on the theory that the treaty between the countries, not the law of the particular country, is determinative. It would appear therefore that article 4, last paragraph, *supra,* is to be construed in the sense attached to it by the United States, namely, that the expression "judicial proceedings" is limited to the rules of procedure obtaining in each state concerning the preliminary hearing of fugitives whose extradition is requested, and that the expression "judicial proceedings" has no reference to the trial of the criminal in the state where the crime was committed and the punishment to be inflicted in accordance with the local laws. At most the expression is one of adjective, not of substantive law.

THE CASE OF COLLINS V. O'NEIL [1]

The case of Collins v. O'Neil decides an interesting and novel point in the law of extradition. It is well known that extradition is a conventional as distinct from a moral right, that the treaty creating it is to be construed, and that the crime for whose commission extradition is sought must be a crime in each of the contracting countries. It is further common knowledge that a fugitive can only be tried and convicted for the offense for which he was extradited; that if he be acquitted of the offense he may return to the surrendering country and a reasonable time is allowed him to do this; that he can not be arrested and tried after acquittal for a crime other than that for which he was extradited, unless by remaining the intent is manifest either to reside indefinitely or to renounce his right to return to the surrendering country.

[1] See Judicial Decisions, p. 747.

The Collins case involves and rightly decides that an extradited fugitive may be convicted of a crime committed within the demanding country after extradition, even although the trial of the original offense for which extradition was had is still pending. On July 13, 1905, Collins was indicted for perjury by the grand jury of San Francisco, California. On October 7, 1905, he was surrendered by the Canadian authorities of Victoria, British Columbia, and taken to San Francisco, and tried for the crime of perjury. On December 23, 1905, the jury disagreed and the case was reset for trial. Upon a trial of the indictment for which he was extradited the defendant was sworn and as a witness committed perjury, December 12, 1905. For this second act of perjury he was indicted, December 29, 1905, arraigned on this indictment in January, 1906, and on February 27, 1906, found guilty and sentenced to imprisonment in the state prison for a term of fourteen years. Collins contended that he could neither be arraigned nor tried on the second indictment until the conclusion of the first and until he had been afforded an opportunity to return to Victoria, British Columbia, from which place he had been extradited.

In holding against both of the contentions of Collins the Supreme Court of the United States not only does substantial justice but makes a valuable addition to extradition practice and procedure.

ARBITRATION TREATY WITH AUSTRIA–HUNGARY [1]

The recent convention of arbitration between the United States and Austria-Hungary is interesting not merely as a further recognition of arbitration, but as a solemn repudiation of the fallacious arguments advanced at the Second Hague Conference against the acceptance of the Anglo-American project of arbitration. The conference unanimously accepted the principle of compulsory arbitration. The difficulty arose, however, when it was proposed to give concrete effect to an abstract principle. Baron Marschall von Bieberstein on behalf of Germany maintained that a project with the reserves of independence, vital interests and honor was unacceptable because what one hand gave the other took away, and instead of advancing the cause of arbitration such a treaty was likely to retard it. The German delegate also opposed the submission of the compromis provided for by the treaty to any legislative or internal body, for the reason that the treaty of arbitration imposed the duty to

[1] See SUPPLEMENT, for text, p. 222.

conclude the compromis and the submission of the compromis to a national legislature rendered it uncertain whether the compromis would be concluded or not, as the failure of the legislative body to ratify the compromis would result in the violation of the treaty. The German delegate felt that those countries whose executives may negotiate the compromis would be placed at a disadvantage because their executives obliged to formulate the compromis would do so and be bound by the compromis thus framed, whereas countries in which the legislature has to be consulted would not be bound until the legislature had given its consent. The statement of this difficulty is itself a refutation, because the compromis is the result of diplomatic negotiation and it is elementary that neither country is bound unless both are, and a failure on the part of the legislative body to approve a compromis liberates the other country from any obligation assumed by its executive. The compromis must be framed by the duly constituted authorities of the contracting countries, and internationally it is of no importance whether that body be a sovereign, a council, a parliament, or congress.

The Austrian delegation based its objection to a general treaty of arbitation upon this fallacy, and the first Austro-Hungarian delegate, M. de Mérey, made himself the passionate mouth-piece of this wholly unintelligible doctrine. Successful at the time, it is being repudiated with unexpected rapidity, and the arbitration treaty between the United States and Austria-Hungary, signed January 15, 1909, and proclaimed May 18, 1909, is the solemn repudiation of an untenable position.

Article 2 of this treaty contains the very provision against which the Austro-Hungarian delegate contended with wit, ingenuity, force, and address: "It is understood that such special agreements [*compromis*] on the part of the United States will be made by the President of the United States by and with the advice and consent of the Senate thereof." This paragraph is really unnecessary because the United States naturally reserves the right to conclude the compromis in the form prescribed by its constitution or consecrated by practice. The final paragraph of article 2 is equally unnecessary, because it provides that "such agreements shall be binding only when confirmed by the governments of the high contracting parties by an exchange of notes." At most this clause is a solemn conventional statement of the elementary fact that neither party is bound unless and until both are and until the compromis is notified to each of the parties neither is bound. As, however, the expression of this elementary principle makes the withdrawal from an untenable position easier and less obvious, its presence is to be highly commended.

THE CASABLANCA ARBITRATION AWARD[1]

In the editorial comment of this JOURNAL for January, 1909, (p. 176) the facts underlying the Casablanca controversy were briefly set forth and the composition of the arbitral tribunal stated. In accordance with the protocol between France and Germany the tribunal, composed of Dr. Kriege and Mr. Fusinato, on the part of Germany; Professor Louis Renault and Sir Edward Fry, on the part of France; and Knut Hjalmar von Hammarskjold as president of the tribunal, met at The Hague on May 1, 1909, listened to the arguments of the agents of the two governments, M. André Weiss representing France, and M. Albrecht Lentze, on behalf of Germany. On the 17th the arguments were concluded and the tribunal deliberated upon its judgment which was delivered at The Hague, May 22, 1909. The decision of the court consists of the few short but weighty paragraphs which follow:

It was wrong and a grave and manifest error for the secretary of the Imperial German consulate at Casablanca to attempt to have embarked, on a German steamship, deserters from the French foreign legion who were not of German nationality.

The German consul and the other officers of the consulate are not responsible in this regard; however, in signing the safe-conduct which was presented to him, the consul committed an unintentional error.

The German consulate did not, under the circumstances of the case, have a right to grant its protection to the deserters of German nationality; however, the error of law committed on this point by the officers of the consulate can not be imputed against them either as an intentional or unintentional error.

It was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate.

Even leaving out of consideration the duty to respect consular protection, the circumstances did not warrant, on the part of the French soldiers, either the threat made with a revolver or the prolongation of the shots fired at the Moroccan soldier of the consulate.

There is no occasion for passing on the other charges contained in the conclusions of the two parties.

The actual decision of the tribunal is clear and satisfactory although it did not directly pass upon some of the important questions necessarily involved. Its language is carefully guarded so as to be inoffensive to the litigating nations, but however involved or obscure, however inadequate or artificial, it is not meaningless. The award is in favor of France,

[1] See Judicial Decisions, p. 755.

couched in such forms as would be palatable to Germany. Leaving out the questions of extraterritorialty and the rights obtained by military occupation, the award taxes the secretary of the German consulate at Casa Blanc with a "grave and manifest fault" in endeavoring to embark upon a German vessel deserters from the French foreign legion who were not German subjects. (Of the several deserters in question, three were German, and the rest were not.) If this stood alone it would clearly mean that the secretary of the German consulate was at fault in protecting citizens or subjects of any other nation against the demands of France, but that his conduct was justified or at least justifiable in protecting his fellow-citizens.

The next paragraph is rather obscure because it exonerates from responsibility the German consul and the other agents of the consulate for this act, but declares that the consul was unintentionally at fault in signing the safe-conduct which was presented to him. However obscure and artificial, this clause must mean that the German consul was to blame for signing a safe-conduct presented to him and it matters little whether he intended to do wrong or not. He should know the consequences of his acts and he should be taxed with their consequences. Ignorance is no excuse.

The next paragraph of the decision must have put to a severe test the ingenuity of the German representative, for while admitting that the German consulate did not possess the right under actual conditions to protect deserters of German nationality, nevertheless, the error of law committed by the functionaries of the consulate should not be imputed to them as a fault, be it intentional or unintentional. The Hague Convention for the peaceful settlement of international disputes provides that the "Tribunal considers its decisions in private and the proceedings remain secret." (Article 78.) Therefore we are likely never to know the authorship of this remarkable pronouncement, but a shrewd guess would ascribe to Mr. Louis Renault the first part of the paragraph, taxing the German consulate with liability, whereas the second paragraph admitting the error of the consulate but freeing it from responsibility bears unmistakable evidence of German authorship. Notwithstanding felicites or infelicities of expression the fact remains that the paragraph squarely asserts that the German consulate did not have the right to protect German deserters from the French foreign legion.

In view of this finding the next paragraph of the decision is somewhat perplexing, because it is gravely asserted that the French military au-

thorities are to blame for not respecting a protection confessedly illegal. It is difficult to see how a protection wrongfully acquired and illegally asserted creates any obligation. And yet it may well be that the protection of the German consulate, however illegal, should be so far observed by the French military authorities as to prevent them from taking by force the deserters in the protection of the consulate. It would seem that Germany may well claim the authorship of this article because it taxes the French military authorities with wrong in not respecting actual although illegal protection exercised by the German consulate, but the fine hand of M. Renault is clearly noticeable in qualifying this wrong with which the French military authorities are taxed. For they were not absolutely or wholly wrong, because they did not respect consular protection, but they were wrong because they did not as far as possible ("dans la mesure du possible") respect it. In other words, it may have been possible to obtain the same results without a resort to force and in so far the French military authorities were at fault. This states rather than decides the difficulty.

This construction seems to derive support from the following paragraph which, eliminating the duty to respect consular protection, states that the circumstances did not justify the measures taken by the French military authorities.

The final paragraph of the decision is very important because it really decides the question at issue but is meaningless without a reference to the facts. For example, the German agent in his argument categorically requested on behalf of his government that the French republic should as soon as possible deliver up the three German deserters and place them at the disposal of the German government. Without referring specifically to this demand the tribunal refused the other claims advanced by the litigating governments, that is to say, the tribunal refused to order the French government to surrender the German deserters to the German government and in so doing necessarily held that France was entitled to their possession. As, however, the award taxes both France and Germany with delinquencies, the mutual apologies and regrets stipulated for will naturally follow, and two great and progressive nations have settled a controversy at one time acute, and always threatening, by a reference to five jurists sitting in the little peaceable country of Grotius.

In calling attention to the ambiguity and obscurity of the decision no criticism is meant either upon France or Germany, or the judges who honorably and nobly performed their mission of justice and therefore of

peace. It may well be that the expressions criticised render the sentence more acceptable to the litigants and therefore the arbiters are to be commended rather than criticised for the language and form of the decision. We should not close our eyes however to the fact that however sincere and however founded in law it may be the decision is a compromise, a triumph of diplomacy transferred from the foreign office to the permanent court of arbitration at The Hague. It is not a judgment such as one would expect from a court of justice. The award is therefore a justification of the solemn declaration of M. Bourgeois at the second Hague conference that the permanent court of arbitration created by the first Hague conference should be continued for the adjustment of political questions, whereas purely legal questions should be submitted to an international court acting under a sense of judicial responsibility. But from whatever standpoint the award be considered, it is a great and notable international event because France and Germany have presented to a court of international arbitration a military question in which honor and vital interests are supposed to be peculiarly involved. War might easily have resulted, but the work of the first conference and an enlightened and insistent public opinion have forced the greatest of military powers to resort to arbitration for the peaceful settlement of international differences, which diplomacy had failed to adjust.

THE CLASSICS OF INTERNATIONAL LAW

At the banquet of the American Society of International Law, held on the 24th of April, 1909, Dr. Robert S. Woodward, president of the Carnegie Institution of Washington, announced the republication by the institution of the recognized classics of international law. Dr. Woodward explained that the original texts were to be reproduced by photographic process, thus avoiding any corruption of the text, that the text would thus be presented to the modern reader exactly as left by the learned author, that the notes, annotations, or variants, comprising an *apparatus criticus,* would form an appendix to the text, and that each work selected for republication would be accompanied by an English translation in a separate volume. The series would include not merely a new and critical edition of the masterpiece of Grotius, but the principle works of his predecessors as well as of his successors, and that the leading and recognized cases in international law should be republished in convenient form for the student as well as the general reader.

The aim and purpose of the Institution is thus to republish the sources of international law so far as they are to be found in the writings of the recognized authorities and by collecting the leading cases to enable teacher and student to see how international law has grown, and is growing, by the application to a concrete case of a recognized principle of international law.

The importance of undertaking the republication of the classics of international law was called to the attention of the Carnegie Institution by Mr. James Brown Scott in a letter dated November 2, 1906, addressed to Dr. Woodward, president of the Institution. As the proposal contained in the letter was accepted by the Institution and is therefore in a certain sense the authoritative exposition of the plan, it is printed:

My dear MR. WOODWARD:

Pursuant to your advice that I put in written form suggestions made to you at various times, I now submit their substance in the form of a proposal, namely: that the Carnegie Institution undertake the republication of the various classics of international law; that the texts be edited in the original without note or annotation; that suitable introductions be contributed to each text by specialists of standing; that the texts be accompanied by translations when the originals are in foreign languages; that the individual texts selected for publication be edited by specialists in international law; and that the series as a whole be under the supervision of an editor-in-chief.

Grotius is universally considered as the founder of international law. This, like many general statements, is true enough, but likely to mislead. He was not the founder nor was he the father of the science, any more than Adam Smith was the founder or father of political economy as a science. Both these distinguished men published comprehensive works based upon competent and extensive knowledge of the theories of the past, and they did the work so admirably that the two books, "De Jure Belli ac Pacis," published in the year 1625, and the "Wealth of Nations," published in the year of our independence, have ever since remained as the first books, if not the sources, of international law and political economy.

The individual greatness of the work of Grotius consists in the fact that he built upon the past with full knowledge of the writings of antiquity and of the Middle Ages, and that his work gave definite form to the belief of the enlightened that the rigors and excesses of war might be regulated by reason and controlled in the interest of humanity. By treating the subject from a general as well as from a particular standpoint he laid the foundations of international law. Without the authority of a law-giver, he pointed out the unreasonableness of existing conditions, and by appealing to the authority of philosopher and poet, lawyer and statesman, he profoundly impressed his contemporaries and has completely captivated posterity. If international law is not the creature of his brain, Grotius must always be considered the first expounder of the subject, and in speaking of him it is scarcely an exaggeration to maintain that the changed and

improved conditions of the present are largely attributable, directly or indirectly to his life and work. The progress of well-nigh three centuries is summed up in the simple statement: should he write his work to-day he would term it the rights and duties of nations in peace and war rather than the rights and duties of nations in war and peace. Since the time of Grotius war has become in a way humanized, and peace bids fair to be the normal state of things.

International law is not, therefore, a creation of Grotius, although he was its first and its greatest expounder. We look beyond Grotius and see that the international law of to-day is rooted in a more remote past. We know, too, that Grotius was the culmination of a quiet and unsuspected development, not the sole figure in international law, although the predecessors are well-nigh invisible in the shadow of his presence. Loose and inadequate conceptions had developed until in Gentilis, a contemporary rather than a predecessor of Grotius, they took definite form and consistency and it would seem to be a fact, easily susceptible of proof, that the treatise of Gentilis, entitled "De jure belli libri tres," was the model of the immortal work of Grotius. As Professor Holland says, "the first step toward making international law what it is was taken, not by Grotius, but by Gentilis."

Grotius is, however, the middle point in the development of international law. To understand the law of nations as it exists and is applied to-day it is necessary to understand its past; and it is the veriest truism to maintain that the future can only be forecast by an adequate knowledge of the past as well as of the immediate present. If international law be considered as undergoing a constant growth and development, it necessarily follows that the law of nations must be studied in the light of its origin and history in order to obtain an adequate knowledge of the system at present and to predict with certainty the future development of the science.

If international law be looked at historically, it is seen that it falls into three great groups consisting, first of the predecessors of Grotius; second, Grotius, his life and work; and, third, the successors of Grotius. That the knowledge of any one is necessary to the other needs no argument, but it is no easy matter for students in America to obtain the necessary materials for the scientific and historical study of the sources of international law.

I have found great difficulty in obtaining any of the works of the predecessors, and it is impossible for students of international law in our various colleges and universities to trace the history of international law to its sources. They may, indeed, find extracts from some of the predecessors in various books of authority, but they can not, as science demands, go to the source itself, examine it, and master it.

Believing, as I do, that international law is a growth just as truly as our Constitution is a growth, and realizing the difficulty of obtaining these various sources, it seems to me that the Carnegie Institution would perform a great service should it publish the texts of the predecessors in such shape and form that they might be placed in public libraries and in universities and colleges. This would perhaps not popularize international law, but it would bring the sources of international law to the people, at least to that section of the people that desires to investigate scientifically the origin of international law.

The importance of the predecessors has been pointed out in various works: by Kaltenborn in his admirable study on "Die Vorläufer des Hugo Grotius auf dem Gebiete des Jus naturae et gentium" (1848); by the late Professor Rivier in Holtzendorff's Handbuch des Völkerrechts, vol. 1, pp. 395 to 402, and more especially in the same author's learned "Note sur la littérature du Droit des Gens avant la publication du Jus Belli ac Pacis de Grotius" (1883); and, within the past two years, in a series of articles, fathered by Professor Pillet, entitled "Les Fondateurs du Droit International" (1904).

The most recent English work on international law is by Dr. Oppenheim, and in an apt paragraph he mentions the most important of the predecessors. That I may have authority for the view I am expressing, and at the same time keep my remarks within reasonable bounds, I quote the paragraphs in question:

> The science of the modern Law of Nations commences from Grotius's work, "De Jure Belli ac Pacis libri III," because in it a fairly complete system of International Law was for the first time built up as an independent branch of the science of law. But there are many writers before Grotius who wrote on special parts of the Law of Nations. They are therefore commonly called "Forerunners of Grotius." The most important of these forerunners are the following:
>
> (1) Legnano, professor of law in the University of Bologna, who wrote in 1360 his book "De bello, de represaliis, et de duello," which was, however, not printed before 1477.
>
> (2) Belli, an Italian jurist and statesman, who published in 1563 his book, "De re militari et de bello."
>
> (3) Brunus, a German jurist, who published in 1548 his book, "De legationibus."
>
> (4) Victoria, professor in the University of Salamanca, who published in 1557 his "Relectiones theologicæ," which partly deals with the Law of War.
>
> (5) Ayala, of Spanish descent but born in Antwerp, a military judge in the army of Alexandro Farnese, the Prince of Parma. He published in 1582 his book, "De jure et officiis bellicis et disciplina militari."
>
> (6) Suarez, a Spanish Jesuit and professor at Coimbra, who published in 1612 his "Tractatus de legibus et de legislatore;" in which (II, c. 19, n. 8) for the first time the attempt is made to found a law between the States on the fact that they form a community of States.
>
> (7) Gentilis, an Italian jurist, who became professor of civil law in Oxford. He published in 1585 his work "De legationibus," in 1588 and 1589 his "Commentationes de jure belli," in 1598 an enlarged work on the same matter under the title "De jure belli libri tres," and in 1613 his "Advocatio Hispanica."
>
> Gentilis's book "De jure belli" supplies, as Professor Holland shows, the model and the framework of the first and third book of Grotius's "De jure belli ac pacis." "The first step" — Holland rightly says — "towards making International Law what it is was taken, not by Grotius, but by Gentilis." (International Law, vol. 1, pp. 76–77.)

I submit, therefore, that it would be a great boon to student and teacher alike to bring within the range of possibility the leading works of the predecessors of Grotius.

In the next place, I would propose an edition of Grotius to be edited in the light of present scholarship, an edition freed from the errors of the printer and cut loose from the mass of editorial note and comment which encumber the text. Until recently the masterpiece of Grotius was not thoroughly understood because it was treated as an isolated work rather than as the growth of a lifetime. It has been discovered, however, that the masterpiece of 1625 was but the enlarge-

ment of a brief or legal opinion which Grotius prepared in 1604 when retained by the Dutch East India Company in an important prize case. The "Mare Liberum," published in 1609, has for two centuries and more been looked upon as a separate and independent work. The discovery in 1864 of the brief of Grotius, called "De jure Praedae," and its publication in 1868 show that this famous little work was chapter 12 of his original brief.

It therefore appears that Grotius began his professional life deeply interested in international law; that in one of his early and most important cases he outlined the subject in his brief on the law of prize; that he kept it by him, and in 1609 published a fragment of it, chapter 12, in separate form; and that the great work of 1625 was an elaboration of a lifetime's thought and study as outlined in the original brief.

The recovery of the tractate "De jure Praedae" is of the highest importance in considering the legal nature of international law; for if the law of nations was not born in the court-room, it was nevertheless cradled in a court of justice. The system is not the dream of a philosopher: it is the realized conception of a jurist and practitioner.

It is therefore obvious that a new and authoritative edition of Grotius should be prepared, which should contain the brief on the law of prize, with footnotes calling attention to the few and unimportant modifications of chapter 12 when published separately as the "Mare Liberum," as well as the text of the immortal three books on the Law of War and Peace. An edition of this kind, with proper introduction and translation, would be a great service to the cause of international law.

The successors of Grotius should, it seems to me, be edited and brought within the reach of the American people, and among these successors I would specially mention the following:

Richard Zouche, an Englishman who is not inaptly termed the second founder of the law of nations and whose little book appeared in 1650 under the title: "Juris et judicii fecialis, sive juris inter gentes, et quaestionum de eodem explicatio, qua, quae ad pacem et bellum inter diversos principes aut populos spectant, ex praecipuis historico jure peritis exhibentur."

Dr. Oppenheim says, and properly, that "This little book has rightly been called the first manual of the positive law of nations;" yet it is almost impossible to obtain this text, and there are very few students, indeed teachers, of international law who are at all familiar with its contents.

In the next place Zouche would be followed by the German Pufendorf, who attempted in his elaborate work "De jure naturae et gentium" (1672) to make international law a branch of the so-called law of nature, rather than a system of positive law.

The next great figure in the history of international law, whose authority is regarded as only less than that of Grotius, is the Dutchman Cornelius Van Bynkershoek, whose three works "De dominio maris" (1702), "De foro legatorum" (1721), and "Quaestionum juris publici libri II" (1737), are classics. They are, however, scarcely obtainable.

Christian Wolff was the immediate teacher of Vattel and to him modern international law owes much. Indeed, his two treatises on international law "Jus

gentium methodo scientifica pertractatum" (1749) and "Institutiones juris naturae et gentium" (1750) supplied a body of doctrine which Vattel merely popularized in his famous book on the Law of Nations published in 1758. The pupil outdistanced the master in popular favor and Vattel is an authority in all parts of the world, while the name of Wolff is known only to the curious or the antiquary. Coin of the realm circulates freely, but bullion does not pass from hand to hand.

I have reduced my proposal to the minimum, and in mentioning these few among the many I would not exclude other works which have a solid claim upon the student of to-day. My immediate purpose is to outline a project, not to present it in detail. However, there are four works that should not be omitted from this brief outline:

Martens' "Causes Celèbres" (2d edition, 5 vols., Leipzig, 1858–61) should be translated and published in this country for the benefit of the student whose knowledge of French is faulty.

The decisions of Lord Stowell on international law should be collected and published in such a way that they might be readily obtained by the student.

The decisions of Chief Justice Marshall in international law are equal to his decisions in constitutional law. In my own individual opinion they give a better understanding of the profound originality and enormous intellectual power of the great Chief Justice. These decisions are classics in America and England, and they are quoted with great respect upon the Continent. They might be collected within the compass of a single volume.

The decisions of Judge Story might be treated in the same way, and while Story did not possess the vigor of his great chief, he possessed learning to which Marshall made no claim. Story's authority on international law is as unquestioned in Europe as it is in America.

No outline, however meager, should fail to mention the judgments and opinions of Sir Leoline Jenkins; the "History of the Law of Nations" by Ward; the luminous and authoritative judgments of our own Kent; and the admirable "Institutes of International Law" by Wildman, which some competent critics consider to be the best English work on the Law of Nations. Nor should the treatises of two German authors be overlooked in this brief enumeration: the "Précis du Droit des Gens Moderne" by G. F. de Martens, and "Das Europäische Völkerrecht der Gegenwart" by Heffter. The former work enjoyed great influence in its day and its day is not yet passed; the work of Heffter is considered by continental critics to be the mark and model of a treatise on international law. However opinions may differ as to the respective merits of these books, they are admittedly classics of the science.

Should this project commend itself to you and should the Carnegie Institution be willing to undertake it as a whole in its elaborated form, the student and teacher of international law, and, in a lesser degree, the people at large, would be put in possession of the masterpieces of international law, namely: the works of the predecessors of Grotius, a proper edition of the masterpiece of Grotius himself, the works of the chief successors of Grotius, and adjudged cases of unquestioned authority in the domain of international law.

In the event that the project for the publication of the classics on international

law meet with favor, I would suggest that a title be selected which indicates at once the legal and universal nature as well as the scope of the series. The codification of Roman law which we owe to Justinian is ordinarily referred to as Corpus Juris Civilis. The Canon law is termed the Corpus Juris Canonici. The Latin expression for international law is either *jus gentium* or *jus inter gentes*. Bearing in mind the terminology applied to the Roman and Canon law, it seems to me that it would be a peculiarly happy turn of expression to name the series Corpus Juris Gentium.

Should the Carnegie Institution, intrusted to your charge, care to undertake the publication of this great work, which I am convinced makes for peace because it makes for international law, thereby substituting, as Mr. Root said in his address at Rio de Jeneiro, "the rule of law for the rule of man," I should be very happy to assume the general supervision of the series should you so desire. But I could only do it upon one condition, namely: that the services of the editor-in-chief should be gratuitous; for in so doing I would have the satisfaction of discharging in some measure the duty laid upon every professional man by my Lord Bacon, who wisely and properly said:

> I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves by way of amends to be a help and ornament thereunto.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: ***Ann. sc. pol.***, Annales des sciences politiques, Paris; ***Arch. dipl.***, Archives diplomatiques, Paris; ***B.***, boletín, bulletin, bollettino; ***B. A. R.***, Monthly bulletin of the International Bureau of American Republics, Washington; ***Doc. dipl.***, France: Documents diplomatiques; ***Dr.***, droit, diritto, derecho; ***For. rel.***, Foreign Relations of the United States; ***Ga.***, gazette, gaceta, gazzetta; ***Cd.***, Great Britain: Parliamentary Papers; ***Int.***, international, internacional, internazionale; ***J.***, journal; ***J. O.***, Journal Officiel, Paris; ***Mém. dipl.***, Mémorial diplomatique, Paris; ***Monit.***, Moniteur belge, Brussels; ***N. R. G.***, Nouveau recueil général de traités, Leipzig; ***Q. dipl.***, Questions diplomatiques et coloniales; ***R.***, review, revista, revue, rivista; ***Reichs-G.***, Reichs-Gesetzblatt, Berlin; ***Staatsb.***, Staatsblad, Gröningen; ***State Papers***, British and Foreign State Papers, London; ***Stat. at L.***, United States Statutes at Large; ***Times***, the Times (London); ***Treaty ser.***, Great Britain: Treaty Series.

December, 1908.

28 GREAT BRITAIN. Accession to the international convention signed at Berne, September 26, 1906, prohibiting the use of white phosphorus in the manufacture of matches. *Treaty ser.*, 1909, No. 4. *See December 17 and 21, 1908.*

30 COLOMBIA—GREAT BRITAIN. Agreement signed at Bogotá providing for settlement by arbitration of certain classes of questions which may arise between the two governments. *Treaty ser.*, 1909, No. 5. Ratified by Colombia, March 5, 1909.

January, 1909.

6 KONGO. Belgian decree permitting forced recruitment of 2,575 natives for construction of Great Lakes Railway. A decree of January 4, 1909, declared this railway to be a work of public utility. The men thus recruited are termed under a decree of June 3, 1906, "travailleurs salariés." *Times*, March 17, April 2. *Errera: Le Congo belge, R. de dr. public*, 25:730; *Morel: A memorial on native rights in the land and its fruits in the Congo territories annexed by Belgium (subject to international recognition) in August 1908*, London 1909; *Official documents, ante*, 3:5; for Secretary Root's note of January 11, 1909, to the Bel-

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gian minister at Washington, *Times*, February 9, and *Official documents, ante*, 3:140; *Reeves: The origin of the Congo Free State, considered from the standpoint of international law*, this *J.*, 3:99; *Hunicke: The Congo question, North American R.*, 189: 604; *Cd.*, 3880; *id.*, 4466; *Arch. dipl.*, 108:1.

20 CENTRAL AMERICA. Convention signed at Tegucigalpa by the five republics to unify their monetary system, customs duties, weights and measures, fiscal laws, and consular service. *B. A. R.*, April. This was the first Central American conference held in accordance with the convention signed at Washington, December 20, 1907. The second conference will be held at San Salvador January 1, 1910. Text in *Memoria....secretaria de relaciones exteriores durante el año 1908*, Guatemala; *B. A. R.*, February; *B. del min. de rel. ext.* (San Salvador), 1:22.

22 HONDURAS—NICARAGUA. Effect given to provisional customs agreement for free exchange of all natural and manufactured products pending completion of treaty with such provisions already negotiated. *B. A. R.*, March. *See November 4, 1908.*

23 BELGIUM—GERMANY. Convention signed at Berlin continuing in effect indefinitely the telegraphic convention signed at Berlin, September 15, 1890. *Monit.*, February 4; *B. Usuel*, January 23. Under article 17 of the international telegraphic convention signed at St. Petersburg, July 22, 1875.

30 GERMANY—GREAT BRITAIN. Declaration signed at Berlin referring the delimitation of the southern boundary of the British territory of Walfish Bay to arbitration. *Treaty ser.*, 1909, No. 10; *Times*, February 18, March 14; *Ga. de Madrid*, March 12, 14. Article 3 of the Anglo-German agreement signed July 1, 1890, provided that "the delimitation of the southern boundary of the British Territory of Walfish Bay is reserved for arbitration unless it shall be settled by the consent of the two powers within two years from the date of the conclusion of this agreement." Article 1: His Majesty the King of Spain shall be asked to select from among his subjects a jurist of repute to decide as Arbitrator in the matter of the delimitation of the Southern Boundary of the British Territory of Walfish Bay. By royal decree, dated March 7, King Alfonso appointed Don Joaquín Fernández Prida arbitrator.

30 ITALY—PANAMA. Postal convention signed. *B. A. R.*, May.

February, 1909.

1 INTERNATIONAL OPIUM COMMISSION opened at Shanghai. *Times,* February 2. *Britannicus: The opium question, North American R.,* 189:61; *Broomhall: The present status of the anti-opium movement, Imperial and Asiatic Quarterly R.,* 27:85; *Midzuno: Japan's crusade against opium, North American R.,* 189:274; *Merwin: Drugging a nation,* New York, 1908; *Cd.,* 4521, 4522; resolutions in *Times,* February 26; *Cd.,* 3564. Adjourned February 26.

2 JAPAN. Baron Komura in a statement in the Diet announced that Japan would give notice next year of the termination of existing commercial treaties. *Spectator,* February 6.

2 SOUTH AFRICA. Report of the delegates to the South African National convention to their respective parliaments. The report recommends that (1) the parliaments meet March 30, for the purpose of discussing the draft constitution, (2) the convention reassemble, if necessary, at Bloemfontein in May, (3) the final draft be submitted in June to the parliaments to pass the addresses for union, (4) a committee of delegates from the colonies which have passed such addresses proceed to England for the purpose of facilitating the passing of the Act. *Natal government ga.,* February 9; *Transvaal government ga.,* February 9; *The government of South Africa,* Capetown, 2 vols., 1908; *The South African constitution, Spectator,* February 13, 1908; *A review of the present mutual relations of the British South African colonies....* [n. p. n. d.]; *The State,* vol. I, No. 1 (January, 1909) *et seq.,* Johannesburg and Cape Town; *Times,* February 4; *Nation,* 88:185; *Independent,* 66:396; *Cd.,* 4525; *Times,* February 10, March 1; *Peace: The unification of South Africa, Nineteenth Century,* 65:904; *Union in South Africa, Quarterly R.,* 210:712. The second session of the National Convention opened at Bloemfontein May 3 and an amended draft of the constitution was signed May 11. *Times,* May 12; *Walton: The case for South African union, National R.,* 53:681.

3 FRANCE—SPAIN. Exchange of notes at Paris renewing for a period of five years the arbitration convention signed at Paris, February 26, 1904. *Ga. de Madrid,* February 15; *J. O.,* February 15.

6 DENMARK. Parliament approves arbitration treaties with United States, Sweden and Norway. *Mém. dipl.*

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9 VENEZUELA. Decree abolishing restrictions on commerce and navigation in Venezuelan ports. *B. A. R.*, April.

9 BULGARIA—GREAT BRITAIN. Additional agreement signed at Sofia modifying the convention of commerce, customs duties and navigation signed at Sofia, December 9, 1905. *Treaty ser.*, 1909, No. 7; *id.*, 1908, No. 1.

9 FRANCE—GERMANY. Declaration signed at Berlin relative to Morocco. Text, *Independent*, 66:395; *R. des deux mondes*, 49:950; *Mém. dipl.*, February 14; this Journal, 3:447.

9 SPAIN. Ratification deposited at Paris of international sanitary convention signed at Paris, December 3, 1903, conformably to the provisions of the procès-verbal of deposit of ratifications signed at Paris, April 6, 1907. *J. O.*, February 15; *Staatsb.*, 1907, No. 24; *Reichs-G.*, 1907, No. 37; *J. O.*, September 1, 1907. The international sanitary conferences have been held at (1) Venice, 1892; (2) Dresden, 1893; (3) Paris, 1894; (4) Venice, 1895; (5) Paris, 1903; (6) Rome, 1907. *See April 6, 1907. Ga. de Madrid*, March 31, 1909.

12 CHINA—PORTUGAL. Agreement signed at Lisbon. Delimitation of Portuguese possessions in the South of China. *Mém. dipl.; North China Herald*, 91:324.

13 UNITED STATES—VENEZUELA. Protocol of agreement signed at Caracas, providing for the submission to arbitration of: (*a*) The claim of the United States of America on behalf of the Orinoco Steamship Company; (*b*) the claim of the United States of America on behalf of the Orinoco Corporation and of its predecessors in interest, The Manoa Company (Limited), The Orinoco Company, and The Orinoco Company (Limited); and (*c*) the claim of the United States of America on behalf of the United States and Venezuela Company. *Sen. doc.* 13, 61 Cong., 1 sess.; *Morris: Our controversy with Venezuela, Yale Law J.*, 18:243; text, *Official documents, post.*

13 MEXICO. Accession to declaration respecting maritime law signed at Paris, April 16, 1856. *J. O.*, April 3, 1909; *Treaty ser.*, 1909, No. 11. The following powers are parties or have adhered to the Declaration of Paris: Argentine, Belgium, Brazil, Chile, Denmark, Germany, Ecuador, Greece, France, Great Britain, Guatemala, Haiti, Italy, Japan, Mexico, Netherlands, Norway, Austria-

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Hungary, Peru, Portugal, Russia, Salvador, Spain, Turkey, Sweden, Switzerland. *Staatsb.*, 1908, No. 325.

13 UNITED STATES—VENEZUELA. Agreement signed at Caracas for settlement of the claim of A. F. Jaurett against the government of Venezuela. *U. S. Senate doc.* 13, 61 Cong.

15 GUATEMALA. Administrative decrees Nos. 694, 695, 696, and 697, containing ratification of four conventions signed at Rio de Janeiro, August, 1906, to wit: (1) patents of invention, drawings and industrial models, trademarks, and literary and artistic property; (2) international law; (3) status of naturalized citizens who again take up their residence in the country of their origin; (4) pecuniary claims. These were ratified by legislative decrees Nos. 714 to 717 of April 17 and 18, 1907. *See August 28, 1908.* Colombia has recently deposited at Rio de Janeiro ratifications of (3) and (4).

15 DENMARK—ICELAND. Proposals laid before the Danish Folkething and the Althing of Iceland. These proposals were formulated by a Danish-Icelandic commission convened at Copenhagen with the object of elaborating a new scheme of union. The proposals give Iceland a large measure of self-government, but the two countries would remain under the same king and same flag, and foreign policy and representation abroad, as well as all questions concerning national defense would be controlled by Denmark. *Times*, March 3. A recent general election in Iceland has resulted in a majority for the party against the proposals and for independence, existing with Denmark a dual monarchy.

19 ROUMANIA—SPAIN. Ratifications exchanged at Vienna of commercial treaty signed at Vienna, December 1, 1908. *Monitorul Oficial*, No. 251; *Ga. de Madrid*, April 29, 1909.

20 SPAIN—UNITED STATES. Exchange of notes at Washington supplementing the commercial agreement signed at San Sebastian, August 1, 1906. The President's proclamation of February 20 admitted sparkling wines produced in and exported from Spain into the United States at the reduced rates authorized by section 3 of the tariff act approved July 24, 1897, in consideration of concessions made by Spain in favor of the products and manufactures of the United States. *U. S. Treaty ser.*, No. 517. In order to remove any possible ground for the exercise by Spain of the right

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under Article III of the San Sebastian agreement. *See August 1, 1906. N. R. G.*, 2:35:293; *R. dr. int. y pol. ext., Tratados*, 2:353; *Ga. de Madrid*, March 30, 1909.

23 NORTH AMERICAN CONSERVATION CONGRESS at Washington issued declaration of principles. Represented: Mexico, Canada, Newfoundland, and United States. *U. S. House doc.* 1425, 60 Cong.; *Proceedings of a conference of governors, May 13–15, 1908*, Washington, 1909; *Annals of the American Academy*, 33: No. 3.

23 GERMANY—UNITED STATES. Agreement signed at Washington for a full and more operative reciprocal protection of patents, designs, etc. Ratification advised by the Senate, April 15, 1909. The reichstag passed the treaty May 18, 1909. *Times*, May 20.

Article 1. The provisions of the laws applicable, now existing or hereafter to be enacted of either of the contracting parties, under which the nonworking of the patent, working pattern (Gebrauchsmuster), design or model carries the invalidation or some other restriction of the right, shall only be applied to the patents, working patterns (Gebrauchsmusters), designs or models enjoyed by the citizens of the other contracting party within the limits of the restrictions imposed by the said party upon its own citizens. The working of a patent, working pattern (Gebrauchsmuster), design or model in the territory of one of the contracting parties shall be considered as equivalent to its working in the territory of the other party.

26 AUSTRIA-HUNGARY—TURKEY. Protocol signed at Constantinople. *Times*, March 1; text, *Mém. dipl.*, March 21. *See October 7, 1908, and April 26, 1909.*

26 INTERNATIONAL NAVAL CONFERENCE. Final protocol and declaration concerning the laws of naval war signed at London. *Cd.*, 4554, 4555; *Doc. dipl., Conférence navale de Londres*, 1909; *R. général de dr. int. public, documents*, 16:1; *Official documents, post*, p. 179; *Bowles: The declaration of London, Nineteenth century*, 65:744; *Nation*, 88:292; *Stowell: The London naval conference, Independent*, June 10.

26 PORTUGAL. Ratification deposited at Berlin of international radiotelegraphic convention signed at Berlin, November 3, 1906. *Treaty ser.*, 1909, No. 8. Austria and Hungary deposited ratification January 17, 1909; Russia on July 8, 1908. For other ratifications, *see July 1, 1908, and December 5, 1908. Monit.*, January 25, 26, 1909.

February, 1909.

27 PORTUGAL—SPAIN. Ratifications exchanged at Lisbon of general arbitration treaty signed at Lisbon May 31, 1904. *See August 18, 1908. Ga. de Madrid,* March 21, 1909.

27 BELGIUM—PERU. Ratifications exchanged at Lima of consular convention signed at Lima, July 18, 1906. *Monit.,* March 24, 1909; text, *Mém. dipl.,* April 11, 1909.

March, 1909.

1 MEXICO. Immigration law takes effect. *B. A. R.,* April.

1 INTERNATIONAL. Proclamation of the President of the United States of the sanitary convention signed at Washington, October 14, 1905, by Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, United States, and Venezuela, providing measures to guard the public health against the invasion and propagation of yellow fever, plague, and cholera. Ratification advised by the Senate, February 22, 1906; ratified by the President, May 29, 1906. Ratified also by Costa Rica, Cuba, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela. Adhered to by Brazil, Colombia, Honduras, and Salvador. *See May 29, 1906, and August 21, 1908. U. S. Treaty ser.,* No. 518.

2 GREAT BRITAIN. Order in council extending to the German protectorates the orders in council of November 28, 1887, and March 7, 1898. *London ga.,* March 9. Germany acceded for and on behalf of its protectorates to the Berne convention and additional act respecting copyright, to take effect January 1, 1909. *See January 1, 1909.*

2 ITALY—UNITED STATES. Supplementary commercial agreement signed at Washington; additional to commercial agreement signed at Washington, February 8, 1900. Proclaimed by the United States and in force April 24, 1909. *U. S. Treaty ser.,* No. 523; *Stat. at L.,* vol. 35; *Official documents, post.*

6 CHINA. Imperial decree reaffirming decision to proclaim a constitution. *North China Herald,* 90:644. *See January 18, 1909, and August 27, 1908.*

6 MONTENEGRO—TURKEY. Treaty of commerce signed at Cettijne. *J. des débats,* March 7; *Mém. dipl.,* March 14.

March, 1909.

6 CENTRAL AMERICAN COURT OF JUSTICE. *Fornos Diaz* v. *Guatemala* dismissed for lack of jurisdiction. For this, the second decision of this court, see *post*, p. 737. For the first decision see *ante*, p. 434, and *post*, p. 729.

10 GREAT BRITAIN—SIAM. Treaty signed at Bangkok settling various political questions between the two countries affecting the Malay peninsula. It places British subjects in Siam who were registered as such before the conclusion of the treaty under the jurisdiction of the international courts, while the British subjects registered after its signature are placed under the jurisdiction of the Siamese courts, but this distinction will disappear with the completion of the Siamese codes of law. European advisers will, however, act in all courts in cases in which British subjects are defendants. *Times*, March 11. The concessions to Great Britain include the States of Kelantan, Trengganu, and Keda. *The new British-protected Malay states, Geographical J.*, 33:478. *See September 17, 1908, and April 29, 1908. Great Britain and Siam, North China Herald*, 87:597; *Q. dipl.*, 25:748; *The new era in Siam, J. of the American Asiatic Association*, 9:132.

11 NORWAY—SPAIN. Declaration signed at Madrid, modifying the additional convention signed August 25, 1903. Sanctioned by Norway, April 27, 1909. Took effect, May 4, 1909. *Ga. de Madrid*, May 2, 1909.

13 GREAT BRITAIN—MEXICO. Ratifications exchanged at Mexico of convention signed at Mexico, December 1, 1908, supplementary to the parcel post convention signed at Mexico, February 25, 1897. *Treaty ser.*, 1909, No. 9; *id.*, 1897, No. 3.

14 RUSSIA. Law closing Vladivostock as a free port takes effect. *U. S. Daily consular reports*, March 13. A large list of goods, however, is retained in the free list. *The closing of Vladivostock, North China Herald*, 91:1; *J. of the American Asiatic Association*, 9:141.

15 CHINA. Imperial decree respecting opium. *North China Herald*, 90:702. *See October 19, 1908.*

16 RUSSIA—TURKEY. Protocol signed at St. Petersburg. Russia consents to the capitalization at five per cent. of a sufficient number of instalments of the Turkish indemnity to produce 125,000,000f. and agrees to accept liquidation of the balance at four per cent.

March, 1909.

As soon as the protocol is ratified, Turkey will recognize the independence of Bulgaria. *Times,* March 17. The Russian council of ministers approved the protocol March 22. *See October 5, 1908.*

20 CHINA—RUSSIA. Exchange of notes at Peking determining the method of collecting taxes from Chinese shopkeepers in the Eastern Chinese Railway zone. The taxes will be collected by Chinese officials and entered as deposits at the Russo-Chinese Bank until the question of the railway's rights has been settled in principle. *Times,* March 22.

20 FRANCE. Decree regulating importation, sale, etc., of opium in Madagascar. *J. O.,* March 26. *See February 1, 1909.*

22 FRANCE. Law approving monetary convention and protocols relative to execution of articles 1 and 17 thereof signed at Paris, November 4, 1908, by France, Belgium, Greece, Italy, and Switzerland. *J. O.,* March 23. *See November 4, 1908. R. gén. de dr. int. public, documents,* 16:32.

22 GREAT BRITAIN. Royal Commission issued appointing commissioners to assist the board of trade in the organization of exhibits illustrative of British arts, industry, and agriculture at the Brussels, Rome, and Turin exhibitions. *London Ga.,* March 23; *Times,* March 24, April 6. A universal international exhibition of art, science, industries, and commerce will take place at Brussels in 1910; an international exhibition of arts and archæology at Rome in 1911; and an international exhibition of agriculture, industries, and commerce at Turin in 1911. *U. S. daily consular and trade reports,* April 14, 1909.

22 CHINA—JAPAN. China asks for submission of the whole Manchurian question to The Hague tribunal. *Times,* March 24. The cases include the Fa-ku-menn railway question; the refusal of Japan to permit China to extend the Northern Chinese Railway into Mukden City; the questions of the collieries; the question of the extension of a branch railway into Newchwang; and the Chien-tao question. Japan claims that Chien-tao is Korean territory. *North China Herald,* 91:357; *Times,* June 2. China has withdrawn this proposal for arbitration. *Times,* June 4.

23 FRANCE. Agreement signed at Paris amendatory of the convention signed June 15, 1901, between the government and the Indo-

March, 1909.

China and Yunnan Railway Company. *J. O.*, April 4, 1909. French decree approving, April 3, 1909.

25 SERVIA. Letter of Crown Prince George to the prime minister announcing his resolve to surrender his right of succession to the throne. *Times*, March 26; *The crown prince of Servia's renunciation, Spectator*, April 3. At a meeting of the cabinet March 27 the crown prince renewed his declaration of renunciation, signing a document to that effect which was countersigned by the king. March 28 the Act of renunciation was read in the Skupshtina, together with a letter from the king to the prime minister accepting the renunciation and declaring Alexander heir to the throne. The Skupshtina approved both communications.

25 CHINA. Imperial decree respecting constitutional government. *North China Herald*, 91:25. *See March 6, 1909.*

25 NETHERLANDS—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, May 2, 1908; ratification advised by the Senate, May 6, 1908; ratified by the President, January 8, 1909; ratified by Netherlands, March 5, 1909; proclaimed by the President, March 25, 1909. *U. S. Treaty ser.*, No. 519; *Staatscourant*, No. 92, April 21.

25 BRAZIL—PORTUGAL. Treaty of general arbitration signed.

26 SERVIA—SPAIN. Ratifications exchanged at Vienna of commercial convention signed at Vienna, November 5, 1908. *Ga. de Madrid*, April 27, 1909.

26 INTERNATIONAL CONFERENCE OF DELEGATES OF GERMANY, ITALY, AND SWITZERLAND, at Berne, for redemption of the Gothard line. Adjourned April 20. *Mém. dipl.*, April 25. The St. Gothard railway became the property of Switzerland May 1, 1909. All the railways of Switzerland with few small exceptions are now in the hands of the state. For the treaties see *N. R. G.*, 1:19:90 and 2:4:625, 675; *Times*, May 7.

30 SERVIA. The diplomatic representatives of Great Britain, France, Russia, Italy, and Germany delivered at Belgrade draft formula. Text, *Times*, March 31. This formula was presented by Servia to Austria-Hungary, March 31, as an explanatory supplement to the Servian note of March 14. *See October 7, 1908. Louis-Jaray: L'annexion de la Bosnie-Herzégovine au pârlement autrichien, Q. dipl.*, 27:158; *Cvijic: L'annexion de la Bosnie et la question serbe*, Paris, 1909.

April, 1909.

1 MOZAMBIQUE—TRANSVAAL. Agreement signed at Pretoria replacing the *modus vivendi* signed at Lourenço Marques, December 18, 1901, together with the addendum thereto dated June 15, 1904 (*Cd.*, 2104). It deals with the Transvaal Railway traffic through Lourenço Marques and the percentage to be allotted to that port, and provides for the establishment of a joint board. It also deals with the labor supply from Portuguese East Africa, the essential conditions of which remain unchanged, and contains some commercial provisions. The joint board is of an advisory nature to recommend to the respective governments an adjustment of railway rates. Term: ten years and until one year after denouncement. *Cd.*, 4587; summary in *Times*, May 26; *Annotaçãoes ao convenio, Oeconomista portuguez*, May 23, 1909. The agreement has been formally accepted by the three other South African colonies.

1 ARGENTINE REPUBLIC—NORWAY. Direct exchange of money orders inaugurated. *L'union postale*, 34:79.

1 FRANCE—SWEDEN. Ratifications exchanged at Paris of commercial arrangement signed at Paris, December 2, 1908. French decree promulgating, April 3. *J. O.*, April 4, 1909. In consideration of France's continuing to give Sweden the advantage of her lowest tariffs, Sweden will make concessions in the duty of French wines. *Times*, December 4.

1 GREAT BRITAIN—HAITI. Abrogation of the convention signed at Port au Prince, April 6, 1906, respecting nationality. *Treaty ser.*, 1909, No. 12; *id.*, 1906, No. 16; *N. R. G.*, 2:35:205.

2 ELEVENTH INTERNATIONAL CONGRESS OF OPHTHALMOLOGISTS opened at Naples.

3 FRANCE. Law approving convention concluded March 8, 1909, between the ministers for the colonies for the finances and for foreign affairs and the France-Abyssinia Railway Company from Djibouti to Adis Ababa; also approving the transaction of March 6, 1909, between the French Somali coast and the imperial Ethiopian railways in liquidation. *J. O.*, April 4.

4 BRAZIL—FRANCE. Treaty of general arbitration signed.

5 FRANCE—PORTUGAL. Ratifications exchanged at Paris of arbitration treaty signed at Paris, June 29, 1906. *J. O.*, April 9, 1909. French decree promulgating, April 7, 1909. *R. gén. de dr. int. public. documents*, 16:32.

April, 1909.

5 CHINA. Naturalization law takes effect. Chinamen shall no longer adopt foreign citizenship. Chinamen who have become subjects and citizens of other states are still Chinamen. *Times,* April 6.

5 MONTENEGRO. The Italian minister at Cettijne on behalf of the powers presented written proposals for the settlement of Montenegro's present difficulties. The Montenegrin government in its reply notifies its acquiescence in Antivari's retaining its commercial character and its full confidence in the maintenance of good relations with Austria-Hungary. Montenegro is, furthermore, willing to abide by the decision of the great powers in regard to clause 25 of the Berlin treaty regarding Bosnia. *Times,* April 7, 9; *Mém. dipl.,* April 11.

5 FRANCE—UNITED STATES. United States Senate advised ratification of extradition treaty signed at Paris, January 6, 1909.

5 ABYSSINIA—FRANCE. Treaty of friendship and commerce signed at Adis Ababa, January 10, 1908, takes effect. *Mém. dipl.,* March 14; *J. O.,* January 31 and March 10, 1909. French law approving treaty, January 30, 1909. Term, ten years and until one year after denouncement.

6 CHINA—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, October 8, 1908; ratification advised by the Senate, December 10, 1908; ratified by the President, March 1, 1909; ratified by China, February 12, 1909; proclaimed, April 6, 1909. *U. S. Treaty ser.,* No. 522; text, *Official documents, post.*

7 FRANCE. Law authorizing ratification of The Hague convention of July 17, 1905, signed by France, Germany, Belgium, Italy, Netherlands, Portugal, Roumania, and Sweden. *J. O.,* April 9, 1909. Effects of marriage on rights, duties, and property.

7 FRANCE. Law authorizing ratification of The Hague convention of July 17, 1905, signed by France, Germany, Belgium, Denmark, Spain, Italy, Luxemburg, Norway, Netherlands, Portugal, Roumania, Russia, Sweden, and Switzerland. Civil procedure. *J. O.,* April 9, 1909. *See April 24, 1909.*

7 FRANCE. Law authorizing ratification of The Hague convention of July 17, 1905, signed by France, Germany, Austria-Hungary, Italy, Netherlands, Portugal, Roumania, and Sweden. Interdiction and similar measures of protection. *J. O.,* April 9, 1909.

April, 1909.

8 BRAZIL—SPAIN. Treaty of general arbitration signed.

8 GERMANY—SALVADOR. Ratifications exchanged at Guatemala of treaty of commerce signed at San Salvador, April 14, 1908. *Reichs-G.*, 1909, No. 22; *Diario oficial*, April 28, 1909.

10 SECOND INTERNATIONAL ARCHÆOLOGICAL CONGRESS opened at Cairo. Next meeting at Rome in 1911. *Times*, April 12.

11 BRAZIL—MEXICO. General treaty of arbitration signed.

15 INTERNATIONAL CONGRESS OF MODERN LANGUAGES opened at Paris. *J. des débats*, April 15.

15 HUNGARY—TURKEY. Direct exchange of money orders inaugurated. *L'union postale*, 34:79.

16 COLOMBIA—SPAIN. Ratifications exchanged at Madrid of convention signed at Madrid, May 30, 1908. Execution of foreign civil judgments. *Ga. de Madrid*, April 18, 1909.

16 HONDURAS—UNITED STATES. Ratifications exchanged at Tegucigalpa of naturalization convention signed at Tegucigalpa, June 23, 1908. Ratified by Honduras, April 7, 1909. *U. S. Treaty ser.*, No. 525.

19 BULGARIA—TURKEY. Protocol signed at Constantinople disposing of all questions pending and providing for recognition by Turkey of the new political status of Bulgaria. *Times*, April 20. Clause VIII: As the questions pending between the Imperial Ottoman and Bulgarian governments enumerated in Article 5 of the St. Petersburg protocol have been arranged, the Imperial Ottoman Government declares that it recognizes the new political situation in Bulgaria. *Times*, April 21. *See March 16, 1909, and April 23, 1909.*

19 NETHERLANDS—VENEZUELA. Protocol signed at The Hague re-establishing diplomatic relations. Venezuela is to pay 20,000 bolivars on account of the Dutch merchant vessels seized in the spring of 1908. Netherlands will restore the captured guard ships. Venezuela will maintain customs *statu quo* which carry a surtax of 30 per cent. on importations from the Dutch and British West Indies, until a commercial treaty is concluded; but treatment of British and Dutch Indies will be equal, the Dutch profiting immediately by any concession to the British. Netherlands engages to restore at Curaçao the prohibition of exportation of arms to Venezuela. *R. dipl.*, April 25.

April, 1909.

19 BULGARIA—RUSSIA. Protocol signed at St. Petersburg regulating the Bulgarian debt to Russia conformably to the arrangement signed by Russia and Turkey. *Mém. dipl.*, April 25.

22 AUSTRIA-HUNGARY—ROUMANIA. Commercial convention signed at Bucharest. *Times*, April 23.

22 PERSIA. British and Russian ministers present joint memorandum to Shah. It includes advice for remodelling the administration, granting a constitution, and proclamation of amnesty to political offenders. *Times*, April 23.

23 BULGARIA. France, Great Britain, and Russia officially notify Bulgaria of their recognition of Bulgaria's independence. Germany, Austria-Hungary, and Italy did the same, April 27. *Times*, April 27; *Q. dipl.*, 27:681.

23 FRANCE. Decree promulgating international convention signed at Rome, June 7, 1905, respecting creation of an international institute of agriculture. The ratifications of all the signatory powers have been deposited at Rome except of Chile, Guatemala, Paraguay, Servia, and Turkey. *J. O.*, April 25. *See September 28, 1908.*

24 INTERNATIONAL. Ratifications deposited at The Hague of the treaty signed July 17, 1905, concerning procedure in civil courts by representatives of Germany, Austria, Belgium, Denmark, Spain, France, Italy, Norway, Netherlands, Portugal, Roumania, Russia, Sweden, and Switzerland. *Times*, April 26; *Ga. de Madrid*, April 30; *Mém. dipl.*, May 9. *See April 7, 1909, and July 15, 1907.*

24 GERMANY. Law giving effect from April 27, 1909, of convention respecting civil procedure signed at The Hague, July 17, 1905. The convention signed November 14, 1896, and the protocol signed May 22, 1897, are declared to go out of force the same date. This convention has been ratified also by Austria, Hungary, Belgium, Denmark, Spain, France, Italy, Norway, Netherlands, Portugal, Roumania, Russia, Sweden, and Switzerland. Ratifications were deposited at The Hague, April 24, 1909. *Reichs-G.*, 1909, No. 23; *La codification de droit international privé, B. des conférences*, 1:98.

26 AUSTRIA-HUNGARY—TURKEY. Ratifications exchanged at Constantinople of protocol signed at Constantinople, February

April, 1909.

26, 1909. *Pinon: Une forme nouvelle des luttes internationales, le boycottage, R. des deux mondes,* 51:199; *Buxton: Balkan geography and Balkan railways, Geographical J.,* 32:217; *Austria's next move in the Balkans, National R.,* 51:890; *Pinon: La crise balkanique-Chemins de fer et réformes, R. des deux mondes,* 45:143; *Richardson: New railway projects in the Balkan peninsula, Scottish geographical magazine,* May, 1908; *Norman: The military situation in the Balkans, Nineteenth century,* 64:730; *Pinon: L'Europe et la crise balkanique, R. des deux mondes,* 48:863; *Joseph Cowen's speeches on the near Eastern question, etc.,* Newcastle-upon-Tyne, 1909; *Dorobantz: L'attitude de la Roumanie dans la crise orientale, Q. dipl.,* 27:70; *Printa: La Bosnie et l'Herzégovine devant la future conférence, id.,* 27: 145; *Miller: The Balkans,* London, 1908; *Ivanovitch: The future of Balkans, Fortnightly R.,* 85:1040.

26 BRAZIL—HONDURAS. General arbitration treaty signed at Guatemala.

27 INTERNATIONAL. Denouncement takes effect by France, Germany, Netherlands, and Spain of the international convention on civil procedure signed at The Hague, November 14, 1896, and the additional protocol signed May 22, 1897. *Monit.,* November 16, 17, 1908; *B. usuel,* November 15. These powers notified the high contracting parties in accordance with article 3 of the mentioned convention. *Buzzati: L'articolo della convenzione dell'Aja sul matrimonio, R. di dr. int.,* 2:5; *Clunet,* 28:5, 231, 516; 33:278, 616, 976; 34:1040. *See April 24, 1909, and March 2, 1907.*

27 TURKEY. Abdul-Hamid II. deposed. A *fetva* or proclamation signed by the Sheikh-ul-Islam, deposing the Sultan on the ground of misgovernment and of what may be termed treason to the Moslem faith, was presented to the Assembly, and acted on immediately by a unanimous vote. Succeeded by his brother, Mehemmed-Reschad Effendi, as Mehemmed V. Abdul-Hamid II. was born September 22, 1842, the second son of Sultan Abdul-Medjid: succeeded his elder brother, Sultan Murad V., who was deposed August 31, 1876, on the ground of insanity, and died August 29, 1904. Mehemmed V. was born November 3, 1844. *See July 24, 1908, and December 17, 1908. Spectator,* May 1; *Halid*

April, 1909.

Halid Bey: The origin of the revolt in Turkey, Nineteenth Century, 65:755; *Washburn: The Outlook in Turkey, Independent,* 66:948; text of fetva in *Times,* April 29; *Marchand: Réflexions sur la crise turque, Q. dipl.,* 27:569; *Fidel: Le comité ottoman "Union et Progrès," Q. dipl.,* 27:438; *Bertrand: Les élites orientales, Jeunes-Turcs et Jeunes-Égyptiens, R. des deux mondes,* 49: 843; *Vambery: The future of constitutional Turkey, Nineteenth century,* 65:361; *Fidel: Le comité ottoman "Union et Progrès," Q. dipl.,* 27:438; *D. K. Brown: Women in the Young Turks movement, Atlantic monthly,* 103:696; *Bérard: La révolution turque,* Paris, 1909; *Ular and Insabato: Der Erlöschende Halbmond; Türkische Enthüllungen,* Frankfurt–a.–M., 1909; *Pinon: L'Europe et l'empire ottoman,* Paris, 1909; *Amadori-Virgilj: La question Rumeliota e la politica Italiana,* Bitonto, 1908; *Dillon: The reforming Turk, Quarterly R.,* 210:231; *Lane-Poole: Turkey,* London, 1908; *Tardieu: La crise turque, Q. dipl.,* 27:633; *Vambery: Personal recollections of Abdul Hamid II. and his court, Nineteenth century,* 65:980.

30 PERSIA. Russian troops occupy Tabriz. On May 5 the Shah issued a proclamation according a constitution to the people. *Times,* May 1, 6.

30 BRAZIL—VENEZUELA. General arbitration convention signed at Caracas. *Ga. oficial,* May 4, 1909.

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES [1]

Aliens, Response to an inquiry as to the admission of, into the United States. 1909. 2 p. *Dept. of commerce and labor.* (H. doc. 1494.)

Attorney-general, annual report of the. 1908. iii, 356 p. *Dept. of justice.* Cloth, 55c.

Attorneys-general, Official opinions of the. 1906–8. v. 26. *Dept. of justice.* Sheep, $1.50.

China, Convention between the United States and, arbitration, signed at Washington, Oct. 8, 1908, proclaimed Apr. 6, 1909. 4 p. *Dept. of state.* (Treaty series 522.)

Chinese, Treaty, laws and regulations governing the admission of. Feb., 1909. 64 p. *Bureau of immigration and naturalization.* Paper, 10c.

Chinese indemnity, Executive order in execution of joint resolution of May 25, 1908, to provide for the remission of a portion of the. [Accompanying papers.] 11 p. *President.* (H. doc. 1275.) Paper, 5c.

Commercial travelers and samples, Regulations governing admission of, into foreign countries; collated by N. J. Stone. 1908. 71 p. *Bureau of manufactures.* (Tariff series 19).

Cuba, Report of the provisional governor of. Dec., 1907 to Dec., 1908. *War dept.* (H. doc. 1457.)

Denmark, Convention between the United States and, arbitration, signed at Washington May 18, 1908, proclaimed Mar. 29, 1909. 5 p. *Dept. of state.* (Treaty series 520.)

Diplomatic and consular appropriation bill [hearings 1909]. 32 p. *H. of R. Committee on foreign affairs.*

Extradition treaty between the United States and the French Republic, signed at Paris, Jan. 6, 1909. 7 p. *Dept. of state.* (Confidential S. ex. doc. V.)

Great Britain, Special agreement between the United States and. North Atlantic coast fisheries, signed at Washington, Jan. 27, 1909. confirmed Mar. 4, 1909. 11 p. *Dept. of state.* (Treaty series 521.)

[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Great Britain, Treaty between the United States and, signed Jan. 11, 1909, providing for the settlement of international differences between the United States and Great Britain, 1909. 11 p. *Dept. of state.* (Confidential S. ex. doc. O.)

Immigration, Annual report of the commissioner-general of. 1908. 236 p., charts. *Bureau of immigration and naturalization.* Paper, 25c.

Immigration and naturalization, Bureau of. Annual report of the chief of division of information. 1908. 12 p.

Immigration commission. Statement relative to work and expenditures. 1909. 44 p. (H. doc. 1489.) Paper, 5c.

International law situations, with solutions and notes. 1908. 255 p. *Naval war college.*

International peace and arbitration, Report amending H. bill 27429, to promote. 1909. 2 p. *H. of R. Committee on naval affairs.* (H. rp. 2282.)

Italy, Convention between the United States and, arbitration, signed at Washington Mar. 28, 1908, proclaimed Jan. 25, 1909. 5 p. *Dept. of state.* (Treaty series 516.)

Liberia, Letter relative to the appointment of a commission to enquire as to conditions in. Jan. 19, 1909. 8 p. *Dept. of state.* (S. doc. 666.) Paper, 5c.

Naturalization, Annual report of the chief of the division of. 1908. 25 p. *Bureau of immigration and naturalization.*

Naturalization of aliens in the United States, how to become citizens, what is required, rights and duties; prepared by the National Society of the Sons of the American Revolution. 1909. 8 p. *Bureau of immigration and naturalization.*

Netherlands, Convention between the United States and, arbitration, signed at Washington May 2, 1908, proclaimed Mar. 25, 1909. 5 p. *Dept. of state.* (Treaty series 519.)

Nicaragua, Naturalization convention between the United States and, signed at Managua, Dec. 7, 1908. 3 p. *Dept. of state.* (Confidential S. ex. doc. I.)

Orinoco steamship company, Report, with accompanying papers, showing the settlement of controversies which existed with the government of Venezuela with respect to the claims of the. 1909. 12 p. *Dept. of state.* (S. doc. 13.) Paper, 5c.

Panama canal, Treaties between the United States and Panama and Colombia relating to the, signed Jan. 9, 1909. 16 p. *State dept.* (S. confidential ex. doc. N.)

Russian-German immigrants, Letter relating to the treatment of. 1909. 3 p. *Bureau of immigration and naturalization.* (S. doc. 729.) Paper, 5c.

Swiss Confederation, Convention between the United States and the, arbitration, signed at Washington Feb. 29, 1908, proclaimed Dec. 23, 1908. 5 p. *Dept. of state.* (Treaty series 515.)

GREAT BRITAIN [2]

Asiatics in the Transvaal, Further correspondence relating to legislation affecting. [Sept., 1908, to Mar., 1909.] *Colonial office.* (cd. 4584.) 7½d.

Berne copyright convention, Accession of German protectorates to the, of 9th Sept., 1886, and to the additional act and declaration signed at Paris, 4th May, 1896. 1st Jan., 1909. *Foreign office.* (cd. 4451.) ½d.

Brazil, Translation of a further decree regulating the naturalization of aliens in. 1909. *Foreign office.* (cd. 4465.) ½d.

Colombia, Agreement between the United Kingdom and, providing for the settlement by arbitration of certain classes of questions which may arise betweeen the two governments. Signed at Bogotá, 30th Dec., 1908. *Foreign office.* (cd. 4531.) ½d.

Congo State, Further correspondence respecting the taxation of natives, etc. in the. 1909. *Foreign office.* (cd. 4466.) 5½d.

Convention of Berne, Correspondence respecting the revised, for the protection of literary and artistic works, signed at Berlin, 13th Nov, 1908. *Foreign office.* (cd. 4467.) 1s. 5d.

Naval conference, International, held in London, Dec., 1908–Feb., 1909. Correspondence and documents (cd. 4554.) 11d.; Proceedings. (cd. 4555.) 3s. 3d. *Foreign office.*

Public health, International agreement respecting the creation of an International office of. Signed at Rome, 9th Dec., 1907. *Foreign office.* (cd. 4532.) 1d.

Tibet, Regulations respecting trade in (amending those of 5th Dec., 1893), concluded between the United Kingdom, China and Tibet. Signed at Calcutta, 20th April, 1908. *Foreign office.* (cd. 4450.) ½d.

Turkey, Correspondence respecting the constitutional movement in. 1908. *Foreign office.* (cd. 4529.) 1s. 2d.

[2] Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, England.

Turkish customs, duties, Protocol between the United Kingdom, Austria-Hungary, France, Germany, Italy, Russia and Turkey respecting. Signed at Constantinople, 25th April, 1907. *Foreign office.* (cd. 4469.) ½d.

United States, Agreement with the, for submitting to arbitration the question of the North Atlantic fisheries, signed at Washington, 27th Jan., 1909, and notes respecting the same. *Foreign office.* (cd. 4528.) 1d.

United States, Treaty with the, relating to boundary waters and questions arising along the boundary between Canada and the United States. Signed at Washington, 11th Jan., 1909. *Foreign office.* (cd. 4558.) 1d.

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PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

HONDURAS V. SALVADOR AND GUATEMALA [1]

Central American Court of Justice

December 19, 1908

Final Conclusions and Award

CHAPTER I.

The Court bears in mind, as regards the plea of inadmissibility of the complaint as entered by the representative of the Guatemalan government under the allegation that article I of the convention creating this court was violated:

1. That the theory on which said party wishes to base its plea would lead to the rejection, on the grounds of illegality, of any complaint not accompanied by proof that negotiations looking to a settlement between the respective foreign offices had been begun and concluded without success; we say begun and concluded, because if the requirement were confined to the mere beginning of conciliatory efforts, pending which a complaint were admissible, the objection would lose all its force.

2. That such a view of the matter finds no foundation either in the wording of the law, or much less in a correct interpretation of its spirit, which, in accordance with the principles governing the interpretation of international compacts, should be investigated with a view to deducing from its purport the consequence most in conformity with the order of ideas and interests to which it corresponds and most in conformity with the purpose of maintaining the full efficacy of the provision itself and as related to the remaining articles of the treaty.

[1] The conclusions of this decision were summarized in the Editorial Comment of this JOURNAL for April, 1909, p. 434. The case arose out of the accusations of Honduras, that Salvador and Guatemala were fostering revolution within the borders of Honduras. For a more detailed statement of facts, and the preliminary pleadings in the case, see this JOURNAL, II:835.

3. That the phrase "in case the respective foreign offices should have been unable to reach an agreement," is far from entailing as a corollary the imperative precept that efforts in this direction must be begun and concluded in every case; for apart from the fact that there would thus be excluded, to the detriment of Central American peace, those claims in which this condition was impossible of fulfillment, we must observe that the certainty of *not being able*, that is, of the real or moral impossibility of reaching an amicable agreement, does not always and solely exist as the result of unsuccessful endeavors, but is usually the result of circumstances which render it necessary at once to characterize such steps as useless, inadmissible, or perhaps dangerous, and therefore to desist therefrom; for instance, if the honor of a nation were involved or a rupture of hostilities should occur by reason of a cessation of relations. And we must suppose that the high parties signing the convention thought thus, for the reason that they did not use the formula "in case the respective foreign offices should have begun and concluded negotiations for the purpose of reaching an agreement," or some other explicit mode of expression, instead of the one adopted.

4. That the function assigned to this court by article XVIII *ibid.*, of arresting the course of an armed conflict by determining, from the very moment a claim is filed, the situation in which the contending governments are to remain pending the rendition of an award, presupposes the right to have recourse to the court without delay in matters of urgency, as occurred in the case under consideration, and if we accepted the above mentioned view of the matter the humanitarian and unquestionably utilitarian purpose for which this important article was inserted would be essentially frustrated, the article being reserved perhaps for emergencies of minor risk and significance or converted perhaps into a simple expression of wish.

5. That this error becomes obvious, moreover, if we observe that it would often shut off the nations from the path of judicial controversy, compelling them to accept war or humiliation as the only alternatives.

6. That the object of the reservation contained in the article under discussion is to hold intact the right of the nations to settle their controversies by amicable agreement notwithstanding their pledge to submit them to the court, but its purpose is not to lay down an inviolable rule that negotiations to this end must be made and exhausted, and if we construe its text in this manner there are no grounds upon which the plea in question can be sustained.

7. That the construction placed upon the aforesaid reservation in the preceding paragraph is further supported by the text of article I of the General Treaty of Peace and Amity signed at the same time as the convention cited, in which article is also embodied the agreement of the signatory republics to submit to this court all their differences of whatsoever nature, and nevertheless the necessity or expediency of first endeavoring to procure an agreement between the respective foreign offices is not even hinted at.

CHAPTER II.

With regard to the plea of insufficiency of the complaint, entered by the same party in the belief that article XIV *ibid.* was violated because the plaintiff failed to accompany his complaint with the proofs of his charges, we take into account:

1. That, as stated in chapter V of the first part of this award, after the complaint was communicated to the high defendants the said proofs were transmitted to them separately as soon as the period within which they were to answer had begun, and as a matter of fact these proofs formed the subject of an extensive and particular discussion on the part of the representative of the Guatemalan government in his written reply and defense.

2. That this second plea can also not be admitted for the reason that, since the ends of justice sought to be satisfied by the said article are accomplished, the plea under discussion is without foundation, and because the party making the objection accepted the suit in this form and answered the charge, referring to all its points and the proof supporting it.

CHAPTER III.

In the complaint both the charges on which the suit is based are directed against the governments of El Salvador and Guatemala without making any distinction between the two high contracting parties regarding the ultimate purpose of the suit, although a distinction is made with regard to facts which are distinguished and separated in the recital; and in order to lay down the premises of the award, the court, * * * reaches the following conclusions:

1. That the records of the case do not show, even in the doubtful form of circumstantial evidence, a single act of support or aid lent to the conspirators by the said governments or by private parties with their

authorization or tolerance, by virtue of which they would incur direct or indirect liability for violation of their neutrality, in the incident which gave rise to this suit; and it must be noted that the only fact that could be cited in this connection against the Salvadorean government (the aid afforded the faction, by means of their personal cooperation, by Lee Roy Cannon and the emigrants Augusto C. Coello and associates, who departed from its territory), could not be charged against it for the aforementioned purpose either in accordance with the general principles of international law * * * or according to the provisions of the General Treaty of Peace and Amity concluded at Washington, or much less in conformity with the declaration embodied in the protocol of the San José Conference, referred to above.

2. That moreover the evidence in the case does not warrant the assertion that such liability arose from a lack of due diligence on the part of the defendant governments in adopting and enforcing the necessary measures to prevent the crime, for the contrary is gathered from all the evidence adduced in the suit. From this standpoint the very recital of the plaintiff excludes the Guatemalan government from such liability by not charging it with any specific act, positive or negative, which would place it under this head of the indictment; and as far as the other high defendant is concerned, only two facts are worthy of discussion, namely, the failure of the prosecution of the aforementioned emigrants and the flight of Lee Roy Cannon from San Miguel where he held the office of Chief of Police, for the purpose of joining the insurrectionist party; but the documents in the case lead to the conviction that the chief executive of the republic of El Salvador, personally and through the authorities under him, exercised, both before and after July 5, all the vigilance that could reasonably be expected from the administrative authorities of the country, in order to prevent the departure of persons who, owing to their political affiliations in Honduras, might be attracted by the scheme of the conspirators, whereas the action taken by the Honduran officials was deficient in this regard; the documents also show convincingly that the flight of Cannon from El Salvador, where he had committed embezzlement and was implicated in the faction, without either the consent or tolerance of the government, can in no wise involve the responsibility of the latter. In this manner there arises in its favor a presumption of honesty and good faith sufficient alone to shield it, if the charge were not further effectively counteracted by the

circumstance that the Honduran government contributed toward its own injury by a lack of precautionary effort. * * *

3. That it can also not be asserted that there was a culpable lack of diligence on the part of the said government because the aforementioned Hondurans had not been arrested and prosecuted at the date of the complaint and escaped from the measures of "concentration" although their seditionary purposes were already known, which question is at once referred to article XVII of the treaty, which is cited by the author as the basis for this chapter of his complaint. The second point has already been treated in the preceding paragraph; with regard to the first point it must be remarked that the obligation assumed by the signatory governments by virtue of the stipulation contained in this article, which is nothing else than a confirmation of a universally recognized international duty, makes it incumbent upon them subject to trial in accordance with their positive law, that is, according to their penal laws and code of procedure any person who begins or foments revolutionary activity against either of them; that the penal code of the republic of El Salvador punishes the consummated crime, the frustrated crime, and the attempt, but not the mere preparation of an unlawful act, and, restricting the repressive power of the law with regard to the last-named imperfect form of the offense, it declares that the proposition and conspiracy are only punishable in the cases expressly indicated by the law, among which are not included violations of neutrality, this being the stand taken on the subject by the penal code of Honduras also; that consequently, even supposing it to be proven that the revolutionary plot had assumed the legal character of a conspiracy, the Honduran officials, owing to a lack of authority, were not under obligation to commence action against the aforementioned persons or to order their formal imprisonment, for which very reason they were obliged to confine themselves, in carrying out the Treaty, to "concentrating" and keeping watch of the suspects through the police authorities to the extent permitted by the laws; that in accordance with the foregoing, the presumption of good faith in favor of the government of El Salvador is not affected in this instance, since it is certain that such presumption is not destroyed by the fact that there were not exercised, for the sake of fulfilling the duties of neutrality, repressive or restrictive measures against individual liberty incompatible with the rules of Salvadorean public law. * * *

4. That it would not be admissible in the present controversy to invoke the obligation incumbent upon every nation to provide laws and institutions for its internal administration which shall render it practically capable of repressing within its territory acts which are injurious to the other members of the international commonwealth, and to be responsible, therefore, for every defect arising from deficiency in the laws, for the penal code and the code of preliminary criminal procedure of the republic of El Salvador, in this part as well as in the remainder of its text, are based on the same principles which govern liability to punishment in the nations in and outside of Central America, and answer the requirements of a civilized people. * * *

5. That the negative conclusion resulting from the considerations above set forth with regard to the assertion of a culpable lack of diligence must be applied to the same charge as made against the government of Guatemala, for all the more reason since neither the complaint nor the evidence presented relate any circumstance which merits the special study and examination of the court.

6. That on account of what has been said it is just to declare also that no grounds are found among the records of the case for admitting that in this form the high defendants incurred, with respect to the revolutionary movement which occurred in Honduras, the responsibility with which they have been charged by the high plaintiff.

Whereas:

The proceedings in the present suit having been considered to be terminated and the deliberations of the court on the various points to be sufficient, the presiding judge proposed the following set of questions to be voted upon in rendering the award which is to decide the controversy:

First: Should we admit the plea of inadmissibility of the complaint as entered by the representative of the Guatemalan Government, under the allegation that the complaint was filed without exhausting the negotiations for an agreement between the respective Foreign Offices? *Second:* Shall we admit the plea, entered by the same party, of insufficiency of the complaint to institute the suit owing to the circumstance that it was not accompanied by the evidence when the charge was originally notified to the opposite party? *Third:* Is it demonstrated and should it be so declared, that the government of El Salvador violated article XVII of the General Treaty of Peace and Amity concluded at

Washington on December 20, 1907, by not "concentrating" and subjecting to trial the Honduran emigrants who threatened the peace of their country? *Fourth:* Is it demonstrated and should it be so declared, that the government of El Salvador violated article II of the Additional Convention to the said treaty, by protecting or fomenting the aforesaid insurrectionary movement? *Fifth:* Is it demonstrated and should it be so declared, that the government of El Salvador contributed towards the accomplishment of said political crime through a culpable lack of diligence? *Sixth:* Should the action begun against the government of El Salvador be consequently declared lawful and the latter therefore sentenced to pay the damages asked? *Seventh:* Is it demonstrated and should it be so declared, that the government of Guatemala violated article XVII of the General Treaty of Peace and Amity concluded at Washington on December 20, 1907, by not "concentrating" and subjecting to trial the Honduran emigrants who threatened the peace of their country? *Eighth:* Is it demonstrated and should it be so declared, that the government of Guatemala violated article II of the Additional Convention to said treaty by protecting or fomenting the aforesaid insurrectionary movement? *Ninth:* Is it demonstrated and should it be so declared, that the government of Guatemala contributed towards the accomplishment of said political crime through a culpable lack of diligence? *Tenth:* Should the action begun against the government of Guatemala consequently be declared lawful and the latter therefore sentenced to pay the damages asked? *Eleventh:* Should the losing party or parties be sentenced to pay the costs of trial?

Whereas:

Having weighed the evidence adduced by the high litigating parties with the freedom of judgment enjoined by article XXI of the aforementioned convention, the judges composing this court voted as follows on the eleven propositions contained in the foregoing paragraph:

The first was answered negatively by the five judges. The second was answered negatively by the five judges. The third was answered negatively by Judges Gallegos, Bocanegra and Astua, and affirmatively by Judges Ucles and Madriz. The fourth was answered negatively by Judges Gallegos, Bocanegra, Madriz and Astua, and affirmatively by Judge Ucles. The fifth was answered negatively by Judges Gallegos, Bocanegra and Astua, and affirmatively by Judges Ucles and Madriz. The sixth was answered negatively by Judges Gallegos, Bocanegra and Astua and affirmatively by Judges Ucles and Madriz. The seventh

was answered negatively by Judges Gallegos, Bocanegra, Madriz, and Astua, and affirmatively by Judge Ucles. The eighth was answered negatively by Judges Gallegos, Bocanegra, Madriz and Astua, and affirmatively by Judge Ucles. The ninth was answered negatively by Judges Gallegos, Bocanegra, Madriz and Astua, and affirmatively by Judge Ucles. The tenth was answered negatively by Judges Gallegos, Bocanegra, Madriz and Astua, and affirmatively by Judge Ucles. The eleventh was answered negatively by Judges Gallegos, Bocanegra, Madriz and Astua, Judge Ucles answering that the governments of El Salvador and Guatemala should be sentenced to the costs.

Whereas:

The court refrains from sentencing any party to pay the costs of trial, both in view of the silence of the convention on the subject and because it considers that it lacks authority to do so because the interested parties made no request in regard to this point.

Therefore:

This Court of Justice, in the name of the republic of Central America, in the exercise of the jurisdiction conferred upon it by the Washington Convention of December 20, 1907, to which it owes its existence, and in conformity with the principles of international law and the positive rules before cited, pronounces the following

AWARD:

ARTICLE 1. The pleas of inadmissibility of the complaint and of insufficiency thereof to begin the action, as entered by the representative of the Guatemalan Government, are declared inadmissible.

ARTICLE 2. The governments of the Republics of El Salvador and Guatemala, the high defendants, are acquitted of the charges made against them in this suit and it is therefore declared that there are no grounds for holding them responsible as demanded by the high plaintiff. and no party is sentenced to pay the costs.

JOSE ASTUA AGUILAR.
SALV. GALLEGOS.
ANGEL M. BOCANEGRA.

The foregoing award was drawn up by the Presiding Judge Astua Aguilar, and is signed by only three judges, because Judges Ucles and Madriz refused to sign it.

ERNESTO MARTIN, Secretary.

DR. PEDRO ANDRES FORNOS DIAZ V. THE GOVERNMENT OF THE REPUBLIC OF GUATEMALA[1]

Central American Court of Justice

March 6, 1909

From an examination of the suit instituted against the government of the Republic of Guatemala, in a complaint dated December 3 last, by Dr. Pedro Andres Fornos Diaz, of age, a lawyer and citizen of Nicaragua, residing at present in this city, it is found:

I. The plaintiff relates that on December 15, 1907, he landed at San Jose, a port of said country, and went to the capital, where after holding a long and important conference with His Excellency the President, Mr. Manuel Estrade Cabrera, he decided that he would leave Guatemalan territory by the first south-bound steamer stopping at its coast; that in the afternoon of the 28th of said month, when he had just left the government palace bearing a passport which he had requested there for his voyage, he was stopped without any cause in the street by officers of the secret police, being taken immediately to the Central Penitentiary and confined in a narrow unhealthy cell, after being stripped of his money (the amount of which he does not state) as well as of the other things which he carried on his person (which he also fails to specify); that a few days afterwards he was called to the jailer's office, where he met "a fellow of middle age, medium stature, swarthy complexion, black eyes and keen glance," whom he afterwards found to be Mr. Adrian Vidaurre, Judge Advocate of the Republic of Guatemala, accompanied by some one who performed the duties of amanuensis or secretary; that the former of the two individuals indicated, without stating the capacity in which he was acting, questioned him regarding matters which did not constitute either a crime or misdemeanor, as when he had left his country, what places he had visited, what he had done, with what persons he had talked about Nicaraguan politics, and to whom he had written communications; that upon signing the declaration he learned that a writ had been issued ordering a preliminary investigation, without stating the crime which gave rise to or justified it; that a little while afterwards the young Honduran Miguel Carias A., at that time also a prisoner there, was called upon to testify whether he knew the plaintiff was a

[1] This is the second decision of the Central American Court of Justice. For the first see this JOURNAL for April, 1909, page 434.

spy of His Excellency President Jose Santos Zelaya, which the witness denied, and he subsequently learned that Dr. Juan Padilla Matute and General Manuel Lardizabal were examined on the same matter; that after that not another word was spoken to him, he was given no notice, no warrant of arrest or imprisonment was served on him, and in this state, subject to an excessively cruel treatment, without any other variation than that he was transferred April 14 to bartolina No. 54, where his sufferings considerably increased, he being kept in this penal establishment until August 14, 1908, on which date, without the money and other things of which he had been deprived being restored to him, he was taken to the port of San Jose, where, after six days of arrest, he was put on board the steamer "Newport," being thus expelled from the country and forbidden to return under threat of being killed.

II. Mr. Fornos Diaz states that he was unable during his arrest to make any appeal against these abuses before the territorial authorities, for he was the victim of an absolute denial of justice, being strictly deprived of any means of communication in the penitentiary as well as during the period following his departure therefrom until his embarcation on the "Newport," and he also adds that he did not take any steps afterwards to obtain reparation for the hardships suffered, because in Guatemala, where the judges are incapable and unable to protect by the law anyone who is ill treated or persecuted by the government, it is impossible to find protection for one's person and rights.

III. Accompanying the complaint are the following manuscripts, adduced as proof of the assertions which the complaint contains:

1. A certificate signed at Managua, August 18, 1908, by the priest Jose Antonio Villalta, in which it is shown that the plaintiff was baptized at Managua on November 25, 1873.

2. Another certificate issued at San Jose de Costa Rica on November 6, 1908, by the Consul-General at Nicaragua, in which it is shown that said gentleman is inscribed in the proper book as a citizen of the latter republic.

3. A deposition for future use taken before the First Civil Judge of San Jose, Costa Rica, in which, under date of October 24 last, Messrs. Dr. Juan I. Toledo Lopez, of Guatemalan nationality; Salvador Toledo, of the same nationality; and Carlos Hack Prestinary Perez, of Costa Rican nationality, declared that the present government of Guatemala

trumps up false suits against persons whom it is unjustly persecuting for political reasons, real or supposed, for which purpose it causes its spies and employees

of all kinds to make false declarations, to misrepresent the statements of other persons, to show confessions to have been made which have not been made, and to make alterations and falsifications of every nature; that it is impossible for a person persecuted and ill treated by said government to obtain justice through the courts of the country; that persons who are confined by its order in the Central Penitentiary have absolutely no power to make any legal appeal whatever, besides which they are robbed of their money, jewels, and whatever things they carry on their persons, and never receive them back.

4. Another deposition of the same character taken in the Civil Court of Puntarenas, Costa Rica, and containing the statements of Messrs. William John Russell, captain of the steamer "Newport," and Edward Owen, an officer on said vessel, made under date of November 23 last. The former affirms that, while his vessel was anchored at San Jose, Guatemala, on August 17, 1908, the harbormaster had two persons brought on board, one of whom was Mr. Fornos Diaz, they being persons who were being expelled from that territory for political reasons; that he refused to receive them that day because the day of departure of the vessel had not arrived, and he sent them on land, whence they were again taken away on the 20th of said month, not being then rejected from the steamer. The second deponent affirms the same facts, but he says he does not know whether the gentlemen whom he mentions were leaving in pursuance to an order to leave the country or voluntarily, and he further avers that they rode third class to Acajutla and that Mr. Fornos Diaz gave him, deponent, a gold watch and chain as a pledge to let him ride first class to Amapala, where he paid the necessary fare.

5. Another deposition taken extrajudicially before the Second Civil Judge of Managua, Nicaragua, and containing declarations of Messrs. Jose Tinetti, Teodoro Tinetti, Rafael Mendez Castillo, and Juan J. Mariena. The first two state that, having been fellow prisoners with the plaintiff, they know that he was confined in the Central Penitentiary of Guatemala and treated with the greatest harshness and mistrust because he was considered a Nicaraguan spy; that he was first arrested for about eight days, at the end of which he was released; but that after a short lapse of time he was again placed in prison and remained there when the deponents left the establishment. The last two make substantially the same statements but they do not speak of the interruption in the confinement, as do the others.

6. Another manuscript dated in the same city of Puntarenas on November 23 last and subscribed by Teodoro Tinetti, whose signature is certified to by a notary public, in which it is stated that owing to the

rigorous confinement to which Mr. Fornos Diaz was subjected he was not able to make any appeal in his defense; that even if he had succeeded in going before the courts, justice would not have been done him, for they are incapable and unable to do justice in Guatemala against the government of His Excellency Estrada Palma, so that the result of such an effort would have been to agravate the situation of the plaintiff and to jeopardize any one who would have lent him aid; that notwithstanding said gentleman had committed no punishable act, he was subjected in the penitentiary to extremely cruel treatment, and that it was always said that he had been imprisoned by order of the above-mentioned ruler because he was regarded as a spy of the Nicaraguan government.

7. Another manuscript from Rivas, Nicaragua, dated October 16 of last year, in which Mr. Augusto Viales, whose signature is certified to by the Chief Civil Magistrates of said Department, confirms the facts related in paragraph 4 above, referring partly to the statements of the captain and officers of the "Newport" and speaking partly from his own knowledge.

8. A document executed and certified to by the notary public Ramon Rostran in the city of Limon, Costa Rica, on October 24 last, in which it is stated that Messrs. Francisco Castrillo C., Pedro Castrillo C., Francisco A. Novoa, and F. Barquero, whose nationality, residence and qualifications are not given, uniformly declared under oath (it does not say before whom) that Mr. Fornos Diaz had a lawyer's and notary's office at Bluefields up to September, 1907, with the best of clientages, for it yielded him sufficient income not only to live comfortably and respectably but also to save considerable money; that he is an owner of agricultural estates and other business enterprises; that it is logical to suppose that his imprisonment must have caused him considerable loss and damage; that said gentleman is an enemy of His Excellency President Jose Santos Zelaya and a person of well known honesty as well as recognized cleanness in politics; that he does not belong to the set of mercenaries who offer their sword or their person to the service of any cause or any government.

9. A certificate of the physicians and surgeons Drs. Eduardo Uribe R. and Inocente Moreira, dated November 29 last, in which these professional men declare to have examined Mr. Fornos Diaz in September of the same year, he being in a condition of extreme anæmia with chronic bronchitis; that he was treated by the former of the deponents and that his health, thanks to a regimen of good food and open air, has improved much.

IV. By reason of the facts related, and invoking the rules of Guatemalan public law, the principles of the law of nations, and article II of the convention creating this court, Mr. Fornos Diaz institutes a suit against the government of Guatemala, asking the court to declare that said government violated, on his person, "the rights which belonged to him in that country as a foreigner and a Central American," and that the high party against whom the action is brought be compelled to indemnify him for all the losses and injuries resulting from the arbitrary imprisonment, cruel treatment and unwarranted expulsion of which he was a victim, as follows: For every month of deprivation of liberty, one thousand pounds sterling; for the expulsion, 2,500 pounds sterling; five hundred for every month the plaintiff is deprived of the professional titles which he was unable to obtain on leaving there owing to the fault of the Guatemalan authorities, and two thousand for the costs of the suit begun.

V. The plaintiff states that, in view of his inability before and now to obtain reparation before the Guatemalan authorities, for the reasons he has set forth and which he deems warranted by the evidence adduced, this court ought to admit the suit as far as the last of the requirements enumerated in article II of the convention is concerned.

VI. The court deliberated on this matter in the sessions held January 13 and 16 and February 3 and 10, and in the last of these sessions, when the time had come to decide, the Honorable Presiding Magistrate submitted the question to the court as to whether the suit under consideration fulfills all the requirements of said article II and consequently whether the court has jurisdiction in the case. Judges Madriz and Ucles voted in the affirmative and Judges Bocanegra, Martinez Suarez, and Astua Aguilar in the negative.

VII. The plaintiff, in a writing dated the following day, challenged Judge Bocanegra, invoking as his grounds the circumstance that this official had furnished a copy of his complaint to a representative of Guatemala, a fact which he characterizes as sufficient to demonstrate his partiality in the matter.

VIII. The challenge having been acted upon in accordance with a resolution of this court, the judges, who passed upon the question in the capacity of arbitrators, adopted a resolution, by a majority of votes, at noon of March 5 instant, declaring that the challenge could not be allowed.

And whereas:

Article II of the convention creating this court gives it cognizance of claims which the individuals of one Central American country file against the government of another of the signatory nations, when these claims arise from a violation of treaties, or, this not being the case, when they are based on legal injuries of an international character, provided the remedies afforded by the laws of the nation against the violation have been exhausted, or a denial of justice is demonstrated.

And whereas:

In order to decide whether the present case fulfills all the restrictive conditions under which the said law establishes the jurisdiction of this Court in such matters, we must bear in mind: (a) That article XXII *ibidem* confers upon it the power to determine its competency "by interpreting the treaties and conventions relating to the subject in controversy and by applying the principles of the law of nations," which means that it must subject its judgment in each case to the rules established by compacts, and in default thereof, to the precepts of the law of nations, for to do otherwise would be to suppose the Central American Court of Justice invested with an authority superior to its own organic law; (b) that inasmuch as the said rule of the convention affects the sovereignty of the judicial branch of governments, because it confers on said court the power to judge matters under the jurisdiction of the territorial authorities, its bearings should be thoroughly scrutinized in applying it, for, as Fiore says, every limitation of autonomy must be regarded "as an exceptional right and be construed in its narrowest sense, in the manner most suitable to the nation on which it has been imposed and causing the least detriment to its natural liberty." *Codified International Law, No. 150.* (c) That under the hypothesis that the purport of said article II is deficient or doubtful as to the question whether the court has or has not jurisdiction in the aforementioned claim, we must resort, as an especially authoritative source, to the discussions and votes recorded in respect to the matter in the proceedings of the Washington Peace Conference, in which are shown the weight and purport which the Central American plenipotentiaries intended and wished to give to this part of the treaty.

And whereas:

In order to judge the case under consideration along these lines we must examine separately the four questions involved, namely: (1) Whether the legal injuries complained of shall be classed by their nature in the group of matters which, in spite of the individual character of

the injury, the law of nations places under its protection; (2) whether the plaintiff has instituted suit demanding just reparation for these injuries before the authorities of Guatemala, and his efforts to obtain reparation have failed; (3) whether, in the absence of this latter condition, the court can, without violating the principles governing the subject, admit, by way of substitute, the allegation and proof of the impossibility or uselessness of bringing action before the territorial courts, based on the assertion that these courts are enslaved or corrupted by the domination of a despotic government; and (4) whether the convention confers upon it or denies it authority for this purpose.

And whereas:

With respect to the first question, inasmuch as the Nicaraguan nationality of Mr. Fornos Diaz is proven, the court considers that the case comes under its jurisdiction if we look at it exclusively from the standpoint of the nature of the charges, for the fundamental rights and powers of the human individual in civil life are placed under the protection of the principles governing the commonwealth of nations, as international rights of man, and it is evident that the facts charged in the complaint constitute an infringement of liberty, an injury to health, and a trespass against the property of the plaintiff, being consequently one of the cases contemplated by the convention. *Bluntschli, Codified International Law, No. 468. Fiore, Codified International Law, No. 522 et seq.*

And whereas:

With regard to the second point it must be observed that the plaintiff himself admits having refrained from taking any steps before the said courts, under which circumstances the court could not take cognizance of the suit without violating the strict and positive provision which the convention makes out of consideration and respect for the sovereignty of nations. This provision is in accordance with the principles of international law, for in reality an offense committed against an individual foreigner does not warrant a diplomatic claim, nor, therefore, within the sphere of the relations among the Central American Republics, does it authorize the aggrieved party to exercise his rights before this court of justice, assuming in a certain way the representation of his country with respect to the claim, until after it is proven that the nation concerned has espoused the charge because of a total or partial denial of justice, and this theory is not affected by the argument that the diplomatic action of powerful nations has been made felt more than

once in the political history of Central America before the matters which gave rise to it had been subjected to a judicial investigation before the local authorities, for the enactment of an irregular procedure can never be rightfully invoked in order to justify tendencies or habits which are contrary to law. The republic of Nicaragua maintained this doctrine in 1878, at the time of the Eisenstuck claim, and in the note of protest signed by His Excellency Mr. A. H. Rivas, Minister of Foreign Relations, under date of May 15 of said year, the following significant ideas are expressed:

> Your Excellency is already aware, from the documents which I have had the honor to transmit to you, of the cause of the difference with the German government; how the Messrs. Eisenstuck, without having made use of all the legal remedies in order to obtain reparation of the injuries of which they complained, presented their claim to the government through the diplomatic representative of their nation; how this representative, relying on the declaration of his consul, which he considered as legally true in spite of the fact that it was made in his own cause and was contrary to other evidence, demanded the immediate punishment of the supposed guilty parties and an international satisfaction, alleging that the republic was responsible for the denial of justice to the subjects of his nation and for an offense to the imperial flag in the person of its consular officers; how the government rejected both claims, on the ground that a denial of justice could only be alleged after a final judgment had been rendered by the courts, and by demonstrating that the judgment was notoriously unjust in the light of the laws of the country and of universally recognized principles. * * *
>
> Nevertheless, in the German question the principles which establish the independence of nations and the practices which the latter have adopted in international intercourse seem to have been deliberately disregarded with respect to Nicaragua. Otherwise a complaint of insults would not have been raised to the category of a diplomatic question without the interested parties first availing themselves of the ordinary and extraordinary remedies afforded by the laws to natives and foreigners in order to obtain reparation for wrongs done them; the statement of the consul in his own behalf would not have been regarded as infallible in the face of contrary evidence of a more impartial and trustworthy character; the republic would not have been held responsible for a delay in its judicial procedures when they were in conformity with the laws of the country and common to both natives and foreigners; still less would it have been held responsible for a denial of justice, even before a final judgment was rendered by the competent authority, and before it was possible, therefore, to prove that the judgment was contrary to the laws of the country and to generally recognized principles, which is the only case in which, according to international law, a nation is responsible for the acts of its courts.

The Chilean treaty writer Cruchaga, in summarizing the precepts which prevail in this respect throughout the domain of the international

commonwealth and which are unanimously proclaimed by established doctrines, says:

> **Governments, which should earnestly endeavor to maintain international relations on the best possible footing, should not grant their support to any but those claims of their citizens which are presented to them with their grounds fully justified, which have been refused to be heard without reason, which are instituted after the remedies afforded by the internal legislation of the country where the grievance occurred have been exhausted, and which are also sustained by the principles and practices of international law.** ***Cruchaga, Notions of International Law, No. 172; Marques de Olivart, Treaty and Notes on International Law, Vol. 1, No. 49; Heffter, International Public Law of Europe, No. 35; Martens, Treatise on International Law, Vol. 1, page 445; Bluntschli, Codified International Law, Nos. 378, 466, 467; Fiore, ditto ditto, Nos. 172, 221, 461.***

The remark which has been made in the course of this discussion against the application of the aforesaid doctrine, alleging that the aggrieved party can not exercise his rights before the territorial courts because the author of the legal injuries complained of is the chief magistrate of the nation; can not be given consideration; in the first place, because there is no evidence to prove the assertion that it was said ruler and not his agents who directly contracted the responsibility arising from such acts, and the judges can not consider any fact to be established a priori unless there is legal presumptive evidence; in the second place, because in Guatemala, the chief executive as well as all the officials of the administration are responsible for their acts before the courts of the nation.

And whereas:

As far the third reason is concerned we must remember that, if we should make the substitution mentioned, it would have to be done as the result of a decision defamatory to the nation concerned, declaring its political organization to be barbarous and corrupt and affirming the consequent impossibility or futility of seeking just reparations of wrongs in its courts. Such a decision, notwithstanding its extreme gravity, would, if the theory of the plaintiff were accepted, be rendered "outside the controversy" (fuera de controversia), without even giving the interested government a hearing, it being thus placed beyond the pale of the law of nations by this stigma, and the court lacks authority to pronounce such a decision, even though it were feasible to prove the grounds for it. In spite of the fact that, in view of the foregoing, it is unnecessary to examine the merits of the extrajudicial evidence ad-

duced in the complaint, it is proper to remark that it was gathered without the actual or pretended participations of the party whom it affects and therefore has a subtantial defect which renders it null and void, for it would be absurd to claim that the summoning or presence of the Costa Rican or Nicaraguan public prosecutor satisfied, with respect to the government of Guatemala, the necessity of the supplementary representation in such acts as demanded by law, and it would likewise be absurd to admit as evidence the private statements which the plaintiff adduces. It is not too much to declare, at the same time, that the testimony contained in these depositions is not sufficient to lead to the conviction intended in the complaint, for although the deponents relate acts and measures performed and taken by the authorities of Guatemala, some of them dating several years back, which they consider unlawful, and though they express their personal opinion regarding the mode of government of said country, the court could not, without violating the fundamental principles governing proof by witnesses, espouse these opinions before possessing all the circumstances of the case and all the indubitable facts which may have prompted the qualifying statements of each of the informants. A witness is only a narrator, and it is the exclusive duty of the judge to determine the moral and legal weight or significance of the acts or events related. Therefore, in face of the actual fact, legally and politically speaking, of there existing in Guatemala laws and institutions which guarantee the individual rights of natives and foreigners, the opinions expressed in the manuscripts adduced by the plaintiff can not prevail, nor has the court the authority to institute an inquiry to ascertain the truth of the matter.

And whereas:

Upon examining into the admissibility of the aforementioned substitution, not from the standpoint of the juridical reasons deduced from the principles of international law, but with respect to the actual purport of the written rule, that is, with regard to what is really prescribed by article II of the convention, as invoked by the plaintiff, it appears that in the Washington Peace Conference the point was made the subject of special discussion, which terminated in the rejection of the idea that an allegation of impossibility could be effectively made in order to relieve the plaintiff from the obligation of instituting action before the territorial authorities, as is explicitly provided in articles VI and VII of the 11th session of the conference, in which account is given of the discussion on the subject, the articles reading literally as follows:

ART. VI. Dr. Bonilla proposed that there be added to the article the phrase: "unless it has been impossible for them to do so." After a debate participated in by Messrs. Madriz, Ugarte, Rodriguez, Batres Jauregui, Gallegos, and Anderson, the session was suspended at 11.50 A. M.

ART. II. The session having been resumed at 12.15 P. M., article II was put to a vote, with the addition proposed by Dr. Bonilla. The delegations from Nicaragua and Honduras voted for the article as thus amended, while those from Costa Rica, El Salvador, and Guatemala voted to approve the article without the addition.

And whereas:

By virtue of the vote taken on the case on February 10 last, it was decided by the court that the complaint in this suit could not be admitted because it did not fulfill the final condition provided in article II of the aforementioned convention.

Therefore:

The Central American Court of Justice, in accordance with the doctrines set forth and applying the rule contained in article II of the Washington Convention, as referred to,

Decides:

First. The said complaint is declared inadmissible because this court lacks jurisdiction in the case as it has been presented.

Second. Let this decision be communicated to the governments of Central America.

JOSE ASTUA AGUILAR.
ALBERTO UCLES.
JOSE MADRIZ.
ANGEL M. BOCANEGRA.
FRANCISCO MARTINEZ S.
ERNESTO MARTIN, Sec.

GEORGE D. COLLINS v. THOMAS F. O'NEIL

Supreme Court of the United States

May 17, 1909

On July 13, 1905, an indictment was found by the grand jury of San Francisco County, California, against Collins, charging him with the crime of perjury, alleged to have been committed in San Francisco on June 30 of that year. He not being found within the state, it was subsequently discovered was in Victoria, British Columbia, and proper demand, under the treaty between the United States and Great Britain, being made for his surrender upon that indictment for trial, he was, on October 7, 1905, duly surrendered, and removed from Victoria by one

Gibson, the agent designated in the Canadian extradition warrant, to San Francisco, where he was placed in the custody of the then sheriff, who also had a bench wararnt issued from the Superior Court on the perjury indictment against said Collins.

His trial upon the indictment upon which he had been extradited began in San Francisco in December, 1905, and resulted in the disagreement of the jury on the 23d of December of that year, and the case was then continued, to be thereafter reset for trial. Upon the trial of the indictment for which Collins was extradited he was himself sworn, and testified as a witness, and on the 29th of December, 1905, after he had given such evidence, he was indicted again by the grand jury of San Francisco County, the indictment charging him with perjury committed on December 12, 1905, while testifying on his own behalf on the trial, as already stated. He was arraigned on this indictment in January, 1906, and after he had made all objections to his being arraigned or placed on trial on this second indictment until the conclusion of the first, and until he had then been afforded opportunity to return to Victoria, he was, nevertheless, brought to the bar and the trial proceeded with, resulting in a verdict of guilty on February 27, 1906, upon which judgment was entered that he be imprisoned in the state prison for the term of fourteen years.

From that judgment he appealed to the District Court of Appeals of California, where it was affirmed, and thereafter he applied to the State Supreme Court for a rehearing by that court, which was denied. *People* v. *Collins, 6 Cal. App. 492;* s. c., *92 Pac. Rep. 513.*

Thereupon Collins, being restrained of his liberty, as well under the judgment of conviction, as otherwise under the extradition warrant, applied to the State Supreme Court for a writ of *habeas corpus,* contending that his conviction and sentence were void and in excess of the jurisdiction of the state court, as being in contravention of his extradition rights under the treaty between the United States and Great Britain, and section 5275 of the United States Revised Statutes, set forth in the margin.[1]

[1] U. S. R. S., section 5275; 3 U. S. Compiled Statutes, page 3596. "Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion

The writ was issued and a return made, denying many of the allegations of the petition, and, after hearing, it was finally dismissed, and Collins remanded to the custody of the sheriff. *154 Fed. 980.*

OPINION

Mr. Justice PECKHAM delivered the opinion of the court.

The objections which the plaintiff in error [Collins] urges to his further imprisonment are founded upon what he insists is implied from the provisions of the treaties between the United States and Great Britain, (1842–1889,) and he contends that under those treaties the state of California had no right or jurisdiction to try him for any offense whatever other than the one for which he was extradited and delivered to the government of the United States for trial, even though he committed an offense subsequently to the extradition, and he further asserts that after a trial has been had for the offense for which he was extradited, he is entitled to be afforded reasonable time and opportunity after his final release on that charge to return to the country of asylum, and that the trial of the crime for which he was extradited must be had within a reasonable time after his extradition, or he is for that reason entitled to his discharge. In other words, the plaintiff in error [Collins] claims immunity, under the treaties, from arrest or detention for any crime committed by him after he has been brought back upon the extradition warrant until he has been allowed a reasonable time to return to the place from which he was taken. He contends that the duty originally resting upon the demanding country to try him only for the offense for which he was extradited and to then afford him reasonable opportunity to return, is unaffected by the fact that he committed another crime after his extradition.

The treaty of 1842, August 9, *8 Stat. 576, sec. 10,* is the one in regard to which discussions as to its meaning have arisen. *United States* v. *Rauscher, 119 U. S. 407.* Subsequently to the treaty, Great Britain passed the extradition act of 1870, *32 and 33 Victoria, chapter 52* · and also in 1873 an act to amend the extradition act of 1870, *36 and 37 Victoria, chapter 60.* Both these acts are cited as the extradition acts of

of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused."

1870 and 1873. See *1 Moore on Extradition, (1891) pages 741, 755.* In subdivision 2 of section 3 of the act of 1870 it is provided:

> (2) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded.

Article 3 of the treaty or convention of 1889, July 12, between Great Britain and the United States is to be found in *26 Stat. 1508–9,* and is also, among others, set out in *205 U. S. 309, 319,* as follows:

> Article III. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

The treatment of the criminal for all acts committed or said to have been committed by him prior to extradition is thus fully provided for.

The contention of the plaintiff in error [Collins] that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed, is not even plausible. Nothing in the Rauscher case (*supra*) is authority for any such contention. The duty to afford opportunity to return after trial, as stated, is limited to matters which happened before extradition, and in the nature of things such duty can not be extended by implication so as to cover a totally different state of facts. Because, in some cases, in construing the treaty, it has been stated that a person extradited can be tried only for the offense for which he was surrendered for trial until he has had an opportunity of returning, it is assumed by the plaintiff in error [Collins] that such language prohibits the trial of a person so extradited for any crime committed by him subsequently as well as prior to the surrender, without an opportunity for his return to the other country. The whole question is simply one as to the meaning of the treaty, and we can not doubt for a single moment what that meaning is.

Much is said by the plaintiff in error [Collins] as to his right to an asylum as if it inhered in himself. The right is, however, simply provided for by treaty, and must be found therein, so far alone as the criminal is concerned.

The question then is, does either the treaty or convention, by express provision or by inference, provide for a return of the criminal to the surrendering country after his surrender and after a subsequent commission of a crime in the country to which he was surrendered? To ask the question is to answer it. The plaintiff in error [Collins] contends for the treaty right to leave the country, notwithstanding his commission of the subsequent crime. This we can not assent to. It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if subsequently to his surrender he is guilty of murder or treason or other crime is, nevertheless, to have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender or any country as willing to accept it. When a treaty or statute contains a provision that the party surrendered shall be tried for no other offense until he has had an opportunity to leave the country, the meaning of such a provision is perfectly plain, and must receive a reasonable and sensible construction. The party proceeded against must not be tried for any other offense existing at the time when he was extradited, (whether at the time of such extradition it had or had not been discovered,) until he shall have had a reasonable time to return to the country from which he was taken, after his trial or other termination of the proceeding. That such privilege should be accorded to one who commits a crime after his surrender to a demanding government lacks all semblance of reason or sense.

Spear in the second edition of his work on the *Law of Extradition* says, at page 84, that the party extradited is not "protected against trial for any offenses which he may commit against the receiving government subsequently to his extradition, and while in its custody, or after his discharge therefrom * * * ." Such a criminal has no asylum, because he never had an asylum within the jurisdiction of the government delivering him, with regard to the crime which he committed since such delivery. *Spear, Id. Id.*

The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the state whose laws he has violated since his extradition, and we can not see that it is a matter of any interest to the surrendering government.

There is nothing in the section of the U. S. R. S. *supra* which gives the least countenance to the claims of the plaintiff in error.

The other objections made by him in regard to the person who now has him in custody under the various warrants and processes, copies of which are returned in the record, we regard as unimportant.

As soon as the judgments herein are affirmed the plaintiff in error will, of course, pursuant to the judgment entered upon the verdict of conviction against him, be taken to the state prison in California, provided for in the sentence, and there confined according to law. The orders and judgments in the two cases [2] are

Affirmed.

AUGUSTA C. MATHER V. EDWARD R. CUNNINGHAM

Supreme Judicial Court of Maine

April 15, 1909

SPEAR, *J.* This is an appeal from the decree of the Probate Court for Waldo County, dated September 11th, 1906, appointing Albert W. Cunningham administrator of the estate of Henry H. Cunningham, deceased, and comes here on report. The agreed facts show that Henry H. Cunningham was born in 1838 in Swanville, County of Waldo, Maine, of parents who were citizens of the state of Maine and resident and domiciled in said county and state. His parents continued to reside in Waldo County, Maine, until 1865, when they removed to Manassas, Virginia. He resided with his parents in this state continuously from his birth until May 3, 1853, the last three years at Belfast, Maine. In May, 1853, at the age of fifteen he went to sea. In 1854 he went to Australia. About 1857 he was for a time a pilot on the river at Shanghai, China. He was never married and at the time of his death his only heirs and next of kin were two brothers and two sisters. He died at Shanghai June 10th, 1905, leaving an estate of personal property valued at over $50,000. He left a will in which he undertook to dispose of his estate, executed in the presence of two witnesses. After his death proceedings were had before the United States Consul at Shanghai, China, for the settlement and distribution of his estate, and the various legatees

[2] The two cases were (1) writ of error from Supreme Court of California for refusing *habeas corpus;* (2) appeal from U. S. Circuit Court for the Northern District of California for refusing *habeas corpus.*

have received their distributive shares through the method usually observed there in the settlement and distribution of similar estates. The appellees, however, deny the right of the consular court at Shanghai to thus settle and distribute the estate of the decedent, upon the ground that he had never acquired a domicil in Shanghai; that his domicil continued during all the years of his absence to be in Waldo County; that his will was not executed in accordance with the laws of Maine, having but two witnesses; and that his estate should be administered here as intestate property. Consequently they applied to the Probate Court for the County of Waldo for the appointment of an administrator to settle the estate. The appointment was made, from the decree of which the appeal before us was taken.

It therefore appears that but two issues, one of fact and one of law, are involved in the determination of this case. Each presents the same question: did the decedent have a domicil in Shanghai at the date of his death, (1) as a matter of fact, (2) as a matter of law. The burden is upon the appellants to establish the affirmative of both issues. *In re Tootal's Trusts, 23 Ch. Div., 532.* We will first proceed to the issue of fact. Assuming, arguendo, that the decedent could acquire a legal domicil in Shanghai, do the necessary facts appear to support this conclusion? Domicil may be established in different ways, but two of which are involved in this case, domicil of origin and domicil of choice. It is conceded that the decedent had a domicil of origin in Waldo County. That domicil continued, whatever the wanderings of the decedent, until he acquired a new one in some other locality. In order to establish a domicil of choice evidence of three important facts must appear, (1) abandonment of domicil of origin, (2) selection of a new locus, (3) the animus manendi. Technically proof of (2) and (3) necessarily establish (1). Putting these facts in the form of a definition, *Gilman* v. *Gilman, 52 Maine, 155,* says: "Domicil is said to be the habitation fixed in any place, without any present intention of removing therefrom." While the term domicil seems to possess more or less elasticity there can be but one domicil of testacy or intestacy. It is the latter sense in which it will be here treated.

The court is of the opinion that had H. H. Cunningham resided in England, France or in any state of the Union, from the time he left Belfast until the date of his death, under precisely the same circumstances that are found in connection with his residence at Shanghai it would clearly appear that he had acquired a domicil in either one of these

localities where he had so resided. *Harvard College* v. *Gore, 5 Pick., 369.* The animus et factum concurred and the forum novum was substituted for the forum originis.

The facts being sufficient to establish the domicil of the decedent upon the soil of any foreign country, including that part of China not affected by treaty relations, we now come to a new and more difficult problem: can an American under any circumstances, whatever the facts, acquire, as a matter of law, a domicil in the province of Shanghai, a place where, by treaty, American law is substituted for Chinese local laws? This proposition raises two important questions: First, whether any good reason can be adduced from all the circumstances of the case why the usual law of domicil should not be applied to the decedent's residence in Shanghai. Second, whether any decision or rule of law, admitting all the facts of domicil, intervenes to inhibit the acquisition of such domicil.

In considering the reasons why the American law of domicil should not apply to American nationals in Shanghai, under the circumstances of this case, the court is unable to discover any substantial objection, nor has any been pointed out in any case. The second question is: is there any established principle of law which intervenes to prevent the practical application of the rules of American law of domicil to Americans residing in China? We are unable to discover any precedent upon this precise point. It may be correct, however, to say, that the English case *In re Tootal's Trusts* denies the acquisition of a domicil of choice by a British subject whether in Shanghai or any other part of China. The ground upon which the right of domicil in this case is denied is that "The difference between the religion, laws, manners and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil." That is, an American may establish his business upon Chinese soil, accumulate a fortune there, and declare his intentions of ever remaining, yet the influence of the religion and customs of the community in which he has chosen to live and die is presumed to be so repugnant to the idea of Western civilization as to rebut all evidence of intention, however conclusive. This is laid down in this case as a presumption of law. It is, however, a dictum founded upon dictum. The whole trend of modern authority, however, is the other way. It is impracticable to go into details in this rescript in stating our conclusions, but upon both reason and authority we are of the opinion that the domicil of the decedent, living in a country that granted extraterritorial privileges, should be determined by the same rules of law that apply to the acquisition of domicil in other countries.

The court therefore holds that Henry H. Cunningham, the decedent, at the time of his decease, had abandoned his domicil of origin in Waldo County, Maine, and had acquired a domicil of choice in Shanghai, China. Therefore, in accordance with the stipulation in the report, the entry must be

Appeal sustained. Decree of the court below reversed.

FRANCE V. GERMANY: THE CASABLANCA ARBITRATION AWARD

Permanent Court of Arbitration at The Hague

Rendered May 22, 1909

Whereas, by a protocol of November 10, 1908, and an agreement to arbitrate of the 24th of the same month, the government of the French Republic and the Imperial German government agreed to refer to a court of arbitration composed of five members the settlement of the questions of fact and law arising from the events which occurred at Casablanca on September 25, 1908, between agents of the two countries; and

Whereas, in accordance with said agreement to arbitrate, the two governments have respectively appointed as arbitrators the following persons, namely:

The government of the French Republic, the Right Honorable Sir Edward Fry, Doctor of Laws, former judge of the Court of Appeals, member of the Privy Council of the King, member of the Permanent Court of Arbitration, and Mr. Louis Renault, member of the Institute of France, Minister Plenipotentiary, professor in the Faculty of Law of Paris, solicitor of the Ministry of Foreign Affairs, member of the Permanent Court of Arbitration; and

The Imperial German government, Mr. Guido Fusinato, Doctor of Laws, former Minister of Public Instruction, former professor of International Law at the University of Turin, deputy to the Italian Parliament, Counsellor of State, member of the Permanent Court of Arbitration, and Mr. Kriege, Doctor of Laws, present Privy Counsellor of Legation, reporting counsellor and solicitor of the Department of Foreign Affairs, member of the Permanent Court of Arbitration; and

Whereas, the arbitrators thus appointed being instructed to name an umpire, chose as such Mr. K. Hj. L. de Hammarskjöld, Doctor of Laws, former Minister of Justice, former Minister of Worship and Public Instruction, former E. E. and M. P. to Copenhagen, former president of the Court of Appeals of Jönköping, former professor in the Faculty of

Law of Upsal, governor of the Province of Upsal, member of the Permanent Court of Arbitration; and

Whereas, in accordance with the provisions of the agreement to arbitrate of November 24, 1908, the cases and countercases were duly exchanged between the parties and communicated to the arbitrators; and

Whereas, the court, constituted as above stated, convened at The Hague on May 1, 1909; and

Whereas the two governments respectively designated as their agents the following persons, namely:

The government of the French Republic, Mr. André Weiss, professor in the Faculty of Law in Paris, assistant solicitor of the Ministry of Foreign Affairs; and

The Imperial German government, Mr. Albrecht Lentze, Doctor of Laws, Privy Counsellor of Legation, reporting counsellor of the Department of Foreign Affairs; and

Whereas, the agents of the parties have presented to the court the following conclusions, namely:

The agent of the government of the French Republic:

May it please the court —

To say and decide that it was wrong for the consul and the officers of the Imperial German consulate at Casablanca to attempt to embark on a German ship deserters from the French foreign legion who were not German subjects;

To say and decide that it was wrong for the said consul and consular officers, under the same circumstances, to grant, on the territory occupied by the French landing corps at Casablanca, their protection and material assistance to three other members of the legion whom they thought or might have thought to be Germans, thus disregarding the exclusive right of jurisdiction belonging to the occupying nation in foreign territory, even in a country granting extraterritorial jurisdiction, with respect to the soldiers of the army of occupation and to acts likely to endanger its safety, whatever they be or wherever they may originate;

To say and decide that, in the persons of Mr. Just, chancellor of the Imperial consulate, Casablance, and of the Moroccan soldier Abd-el-Kerim ben Mansour, no breach of the rules regarding consular inviolability was committed by the French officers, soldiers, and sailors, who arrested the deserters, and that in repelling the attacks and acts of violence directed against them the said officers, soldiers, and sailors, merely availed themselves of the right of self-defense.

The agent of the Imperial German government (conclusions translated):

May it please the court —

1. As regards the points of fact, to declare that three individuals who had previously served in the French foreign legion, namely, Walter Bens, Heinrich Heinnemann, and Julius Meyer, all three Germans, were, on September 25, 1908, at the port of Casablanca, while accompanied by agents of Germany, violently wrested from the latter and arrested by agents of France, and that on this occasion agents of Germany were attacked, maltreated, outraged, and threatened by the agents of France;

2. As regards the points of law, to declare that the three individuals mentioned under No. 1. above were, on September 25, 1908, subject exclusively to the jurisdiction and protection of the Imperial German consulate at Casablanca, and that agents of France had no authority at that time to interfere with agents of Germany in granting German protection to these three individuals and to claim for themselves a right of jurisdiction over said individuals;

3. As regards the status of the individuals arrested on September 25, 1908, and concerning whom there is a dispute, to decide that the government of the French Republic shall release the three Germans mentioned under No. 1 above as soon as possible and place them at the disposal of the German government.

And whereas the agent of the French Republic, in the hearing of May 17, 1909, declared that in his conclusions the only measures referred to, either with respect to the deserters of German nationality, or the others, are those taken by the German agents after the desertion and with a view to embarking the deserters; and

Whereas, after the court had heard the oral statements of the agents of the parties and the explanations which they furnished it at its request, the debates were declared closed at the hearing of May 17, 1909; and

Whereas, under the extraterritorial jurisdiction in force in Morocco the German consular authority as a rule exercises exclusive jurisdiction over all German subjects in that country; and

Whereas, on the other hand, a corps of occupation as a rule also exercises exclusive jurisdiction over all persons belonging to it; and

Whereas, this right of jurisdiction should be recognized as a rule even in countries granting extraterritorial jurisdiction; and

Whereas, in case the subjects of a power enjoying the rights of territorial jurisdiction in Morocco belong to a corps of occupation sent to

that country by another power, there necessarily arises a conflict between the two jurisdictions mentioned; and

Whereas, the French government did not make known the composition of the expeditionary corps and did not declare that the fact of the military occupation modified the exclusive consular jurisdiction arising from the extraterritorial rights, and that, on the other hand, the German government made no protest regarding the employment in Morocco of the foreign legion, which is known to be composed in part of German subjects; and

Whereas, it is not within the province of this court to express an opinion regarding the organization of the foreign legion or its employment in Morocco; and

Whereas, the conflict of jurisdictions mentioned above can not be decided by an absolute rule which would in a general manner accord the preference to either of the two concurrent jurisdictions; and

Whereas, in each particular case account must be taken of the actual circumstances which tend to determine the preference; and

Whereas, the jurisdiction of the corps of occupation should have the preference in case of a conflict when the persons belonging to this corps have not left the territory which is under the immediate, lasting, and effective control of the armed force; and

Whereas, at the period in question the fortified city of Casablanca was occupied and guarded by French military forces which constituted the garrison of that city and were stationed either in the city itself or in the surrounding camps; and

Whereas, under these circumstances the deserters of German nationality who belonged to the military forces of one of these camps and were within the inclosure of the city, remained subject to the exclusive military jurisdiction; and

Whereas, on the other hand, in a country granting extraterritorial jurisdiction the question of the respective competency of the consular and the military jurisdiction is very complicated and has never been settled in an express, distinct, and universally recognized manner, so that the German consular authority could not incur any blame for having granted his protection to the aforementioned deserters who had solicited it; and

Whereas, the German consul at Casablanca did not grant the protection of the consulate to the deserters of non-German nationality and the dragoman of the consulate also did not exceed the limits of his authority in this regard; and

Whereas, the fact that the consul, without reading it, signed the safe-conduct for six persons instead of three and omitted to state that they were of German nationality, as he had prescribed himself, can not be imputed against him except as an unintentional error; and

Whereas, the Moroccan soldier at the consulate, in aiding the deserters to embark, acted only in accordance with orders from his superiors and, by reason of his inferior position, could not have incurred any personal responsibility; and

Whereas, the secretary of the consulate intentionally sought to embark the deserters of non-German nationality as enjoying the protection of the consulate; and

Whereas, for this purpose he deliberately induced the consul to sign the abovementioned safe-conduct and with the same intention took measures both to conduct the deserters to the port and to have them embarked; and

Whereas, in acting thus he exceeded the limits of his authority and committed a grave and manifest violation of his duties; and

Whereas, the deserters of German nationality were found at the port under the actual protection of the German consular authority and this protection was not manifestly illegal; and

Whereas, this actual situation should have been respected by the French military authority as far as possible; and

Whereas, the deserters of German nationality were arrested by said authority despite the protests made in the name of the consulate; and

Whereas, the military authority might and therefore ought to have confined itself to preventing the embarkation and escape of the deserters, and, before proceeding to their arrest and imprisonment, to offering to leave them in sequestration at the German consulate until the question of the competent jurisdiction had been decided; and

Whereas, this mode of procedure would also have tended to maintain the prestige of the consular authority, in conformity with the common interests of all Europeans living in Morocco; and

Whereas, even if we admit the legality of the arrest the circumstances did not warrant, on the part of the French soldiers, either the threats made with a revolver or the prolongation of the shots fired at the Moroccan soldier of the consulate even after his resistance had been overcome; and

Whereas, as regards the other outrages or acts of violence alleged on both sides, the order and the exact nature of the events can not be determined; and

Whereas, in accordance with what was said above, the deserters of German nationality should have been returned to the consulate in order to restore the actual situation which was disturbed by their arrest; and

Whereas, such restitution would also have been desirable with a view to maintaining the consular prestige; however, inasmuch as, in the present state of things, this court being called upon to determine the final status of the deserters, there is no occasion for ordering their provisional and temporary surrender which should have taken place;

Therefore:

The court of arbitration declares and decides as follows:

It was wrong and a grave and manifest error for the secretary of the Imperial German consulate at Casablanca to attempt to have embarked, on a German steamship, deserters from the French foreign legion who were not of German nationality.

The German consul and the other officers of the consulate are not responsible in this regard; however, in signing the safe-conduct which was presented to him, the consul committed an unintentional error.

The German consulate did not, under the circumstances of the case, have a right to grant its protection to the deserters of German nationality; however, the error of law committed on this point by the officers of the consulate can not be imputed against them either as an intentional or unintentional error.

It was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate.

Even leaving out of consideration the duty to respect consular protection, the circumstances did not warrant, on the part of the French soldiers, either the threat made with a revolver or the prolongation of the shots fired at the Moroccan soldier of the consulate.

There is no occasion for passing on the other charges contained in the conclusions of the two parties.

Done at The Hague in the building of the Permanent Court of Arbitration, May 22, 1909.

HJ. L. HAMMARSKJÖLD, *President.*

MICHIELS VAN VERDUYNEN, *Secretary General.*

BOOK REVIEWS

France and the Alliances. By André Tardieu. Paris.

Mr. André Tardieu's recent book on France and the Alliances is based upon a series of lectures delivered by him at Harvard in 1908 on that subject. The work is both interesting and timely: I say it in no perfunctory spirit: interesting because it deals with the subtle complications of European diplomacy since the Franco-German War, told in graphic and entertaining fashion; timely because the present situation in Europe is causing in many quarters grave apprehension, charged as the atmosphere now is with so much combustible matter. The diplomatic situation of today is one to challenge the interest of all thinking men. To understand the present condition of affairs, some examination of the trend of diplomacy during the past thirty years is necessary. This Mr. Tardieu has undertaken, making, as is natural, his own country the centre. In his own language, he desired to show cultivated Americans

> France of to-day, in the presence of Europe and the world, such as she has been shaped, after painful experiences, by thirty-eight years of sustained effort and diplomatic action.

To attempt to epitomize, or even to recapitulate the historical matter of the book, would be impossible in the brief space allotted to a mere reviewer, and would too greatly entrench upon the space allotted to those superior and original thinkers — the contributors of leading articles. Should the reviewer succeed in sending students of diplomacy to the book, he will have fully accomplished his object.

After 1871, France had not only lost the dominating position held by her in Europe down to 1866, but broken, dismembered, humiliated, and torn by factions, her prospect of once more playing a leading role seemed distant indeed. Internal prosperity indeed returned more quickly than could have been expected owing to the buoyancy, industry and thrift of the French people; yet externally they were completely isolated.

Mr. Tardieu considers France and Russia natural geographical allies. With Poland, Turkey and Sweden, she had been able in the past to make head against her old enemy Austria: to hold her own against Germany today, the Russian alliance was necessary. Differences in régime; mala-

droitness on the part of European administrations; the dominating force, and magnificent skill of Bismarck conspired to keep the allies apart for some time after the German War. In 1875, however, when Germany had made up her mind that France was recuperating too rapidly, and that another humiliation might be necessary, the Russian emperor allowed it to be known through his Minister of Foreign Affairs that "We want France as strong as she was in the past," and another German invasion was averted. Subsequently Russia sought and obtained great loans from France, and France has now become Russia's creditor for twelve billions of francs; many international courtesies were interchanged, and as early as 1891, the Franco-Russian, or dual alliance, had become a *fait accompli*.

> Its object was not to give us back Alsace-Lorraine. But it insured us in Europe, a moral authority which, since our defeats, had been wanting to us. It augmented our diplomatic value. It opened to us the field of political combinations, from which our isolation had excluded us. From mere observation, we could pass to action, thanks to the recovered balance of power.

France's situation, diplomatically, was thus down to the Russo-Japanese War, fairly assured. The dread of German attack or national humiliation in the diplomatic forum was averted. The consequences of Russia's Manchurian policy, however, were unforeseen. French capital went into the Trans-Siberian Railroad, and the able and brilliant Mr. Delcassé apparently did nothing to divert Russia from her policy and the war with Japan. Bitter was the disappointment in France at the news from the Far East, and the final disaster at Mukden seemed to render the alliance of little value to France, and to place her again in a position of enforced isolation, minus her twelve billions of francs.

The French Foreign Office had, however, done more than effect the Russian alliance. Three centuries of conflict had divided France from England. Clashing colonial interests in all parts of the world, the memory of Egypt abandoned to the English, the unwillingness or inability of the Government to support French explorers in Africa, and the final humiliation of the Fashoda incident, made any *rapprochement* between the two countries seem a feeble and hopeless dream. Yet in diplomacy it is usually the unexpected that happens. We count too much upon national feelings and sentiments, and do not realize that they in turn are governed largely — if not wholly — by economic and commercial considerations. Great, therefore, was the surprise, when, on the 8th of April, 1904, the *entente cordiale* between the two countries became known,

with an *éclaircissement* of all the old misunderstandings and a guaranty of friendly co-operation in the future against a disturbance in the balance of power. German commercial conquest pressing on the English markets throughout the world during the last few years had sufficed to obliterate the memory of Cressy, Waterloo, and recent Fashoda. The common dread of German hegemony had turned the hereditary enemies into friends, all in a day. England's reply to Emperor William II's appeal to the German people saying, "our future is on the sea," is to be found in the *entente*, ably and tactfully initiated by that masterly diplomat — King Edward VII.

The solution of the old quarrel also involved recognition of France's peculiar situation in Morocco, and thus led to the *entente* being put to a test in short order. But Mr. Delcassé did not only aim at better relations with England. Italy's adherence to the German-Austrian alliance had been largely due to dislike and jealousy of France. Nations are not usually grateful. Louis Napoleon's policy of aiding Italian consolidation, without allowing the monarchy to occupy Rome, had created a condition of "gallophobia," illogical as it may seem. Subsequently, jealousy of France's extension in North Africa, and consequent widening of her influence in the Mediterraneau, embittered relations. This situation was, however, due to sentiment rather than to the real interest of the nation and consequently could have no firm or abiding basis. For Italy, "The financial consequences of the alliance with Germany were disastrous." Friendly relations with the Paris money market were potent to accomplish what Louis Napoleon's quixotic attitude so miserably failed to do. Thus, Mr. Delcassé was able to bring about a *rapprochement* with Italy, which, without modifying the text of the Triple alliance, made it lose its edge. Italy had been led to interpret it as purely defensive and ceased to be — by her provocative attitude — an excuse for possible German aggression. The Triple alliance thus became

> Less threatening militarily, more peaceable politically. To Germany, if attacked by France, it leaves the support of the Italian Army; but for an attack on France there is no longer the assistance of Italian provocations.

Again, as part of the skillful policy of the French Foreign Office, close relations were established with Spain. Spain's claims in Morocco, which might have been a source of international irritation, were recognized, and her aid secured to France in her endeavor to tranquillize

that troubled country. Possession of Algeria, and of Tunis, gave France a peculiar situation. Her object has not been to annex Morocco: the task would be expensive, burdensome, ill-requited. In the loosely organized, feudal condition of the Sultan's domains, constant disorder menaces the French frontier and her African possessions; profitable commercial relations cannot be developed and French capital is cut off from a valuable source of exploitation. With this in view, France and Spain agreed to recognize common interests and a rather vague understanding was entered into in the summer of 1904 that the French Republic and the King of Spain,

> Having agreed to determine the extent and the guarantee of the interests belonging to France by reason of her Algerian possessions, and to Spain by reason of her possessions on the coasts of Morocco, * * * Declare that they remain firmly attached to the integrity of the Moroccan Empire under the sovereignty of the Sultan.

This was the situation in which France found herself at the time of the battle of Mukden. Scarcely, however, had the news reached Berlin, when the German government, which had apparently had knowledge of, and tacitly, at least, acquiesced in, the Moroccan understandings, informed the French Foreign Office that these agreements were apparently entered into for the purpose of isolating Germany; that they would not be considered valid without the assent of Germany, and that Mr. Delcassé must be dismissed and a conference called. Unfortunately Mr. Delcassé's work had been purely diplomatic. The basis of diplomatic policy must ultimately rest upon force. Internal dissensions and socialistic policies had weakened the French Army and the government was not prepared to fight. The government, therefore, swallowed the humiliation of dismissing Mr. Delcassé, and acquiesced in the conference plan. Germany thus seemed to have re-established her hegemony in Europe, as in the Bismarckian time. Results of the conference showed, however, that while the Triple alliance still stood, France was no longer isolated. Her policy and views were practically acquiesced in by all the nations save Germany and Austria, and while the humiliation of having to dismiss her minister, and bow to the demands of Germany, was still upon her, a show of hands had proved that the Triple alliance found itself opposed by France, England and Russia with Italy sustaining the French view, Austria alone voting finally with Germany. That the Moroccan incident was a mere pretext to batter down the diplomatic combinations which Germany seemed to feel threatened her hegemony, seems clear;

but what Germany really feared was not isolation, for of that there was no substantial danger, but rather that France should cease to be isolated and become the centre of a combination that could diplomatically checkmate, if occasion arose, the dominant ascendancy of the Triplice. The conflict of the alliances thus failed — to use the language of our author —

> To build up, on the threshold of the twentieth century, the most extraordinary structure of political power that had ever been raised since the time of Napoleon I; to save Bismarck's work from the assaults of age.

Interesting accounts are found of the new Asiastic and European understandings consequent upon the diplomatic realignment of the nations.

Our author concludes with a chapter on France and the United States. The sentimental considerations forming the basis of Franco-American friendship have never been seriously shaken. During the Moroccan crisis, our position virtually sustained that of France, not because of any hostility toward Germany, but because the French claims — as the event showed — were just, and the French position made for the balance of power in Europe.

> When the United States are in presence of Europe, they have only one preoccupation: to maintain the balance of power, while opposing any attempt at one-sided domination.

The acquiescence of France in the Monroe Doctrine and her desire to form closer commercial relations with the United States, and finally, fear of German competition, formed, together with traditional friendship, dating back to Lafayette, Rochambeau and York Town, an excellent basis for the most cordial relations between the two countries.

The conclusion of our author would seem to be that the key-note of diplomacy, since the Franco-German War, has been the desire of Germany to play a leading role in Europe, inconsistent with the balance of power, thus maintaining the position assumed as a consequence of the Franco-German War and so skillfully maintained by Bismarck's forceful diplomacy. While he treats this from a purely diplomatic standpoint, one cannot fail to observe, how — after all — diplomatic policies are affected by economic considerations. The apparently dominating — and sometimes brutally aggressive — policy of the German Foreign Office can only be understood as the result of that extraordinary commercial and economic development from a loose confederation of states, composed

largely of land owners, scholars and peasants, into one of the three leading manufacturing and commercial nations of the world. What changes in the world's map this condition of affairs is destined to bring about, no one can safely prophesy nor should an humble reviewer try to prognosticate. A more intelligent appreciation of the present system and of the probable future, can be acquired by reading the delightful, scholarly and entertaining work of Mr. Tardieu, which he concludes in thus summing up the attitude of the United States toward Europe:

> Being in full economic progress, playing her part in the world-game, the United States would not be able to regard without apprehension the subjection of Europe to any single power. They are aware that William II, when he is not preaching a crusade against the Yellow Race or against England, takes pleasure in denouncing the American peril to the "United States of Europe," which he would like to form beneath his rule. They are ready to respect Germany's legitimate interests whenever they meet with them. But, on the other hand, by reason and by instinct they are on the side of France, when, in defence of her diplomatic autonomy, the latter country undertakes, as a necessary condition, the defence of the balance of power in Europe. This is a moral guarantee for our policy as strong as any written engagements. Is it not for the said policy, at the same time, the best of justifications?

FREDERIC R. COUDERT.

La Evolucion del principio de arbitraje en America. By Francisco José Urrutia.

The juridical and historical treatise which bears this title, and which comes from the pen of the distinguished Latin American, His Excellency, Francisco José Urrutia, Minister of Foreign Affairs in the Republic of Colombia, was presented to the fourth scientific congress, which met in Santiago, the capital of Chili, on the 25th of December 1908.

It is a work of unquestionable merit, both in matter and in manner. The writer traces accurately, succinctly and clearly, the history of arbitration in tropical America, from the days of the great separation from the jurisdiction of Spain to the present time; and, in considering the peculiarities of this arbitration, which was proclaimed by Bolivar to be the great bond of union between the Latin American nations, he gives some just and interesting reflections such as the subject could not fail to suggest to a comprehensive mind. The style of the work is perspicuous, at times elegant and flowing, and calculated to please even a casual reader.

This is not the first work that has appeared on Latin American arbitration. Many publicists have written on the subject, more or less at length, and all agree in regarding it, not as a theme for pleasant speculation or for rhetorical display, but as an inherent part of Latin American public law, as the very backbone of much international legislation — a doctrine the importance of which it is not easy to exaggerate, based, as it is, on unshakable principles, and having very practical effects — a doctrine which has, on several occasions, avoided unhappy contingencies and brought disputes to amicable compromises.

We must say, however, that we do not agree with Mr. Urrutia in two of his observations. The first refers to the Central American Convention celebrated at Washington on November 15, 1907, the articles of which were signed on December 20 of the same year.

One of the immediate fruits of the convention, it is well known, was the resolution to establish a Central American Court of Justice, which should decide international questions in these countries, *not politically but judicially*. Mr. Urrutia very justly applauds this high conception, and affirms that the convention, in its far-reaching and super-excellent effects "will realize that ideal which the three Pan-American Conferences and the Hague Conference likewise failed to attain." He also says, in language which would be too hyperbolical were it not justified by reality: "For the first time, if we are not mistaken, a group of American nations has, as it were, embodied in a solemn covenant, the most advanced aspirations that in modern times, are characteristics of international judicature. The embodiment of great civilizing principles in such durable texts as those we have copied," he continues, "can not but be looked on as a magnificent triumph of the loftiest ideals of justice and humanity. In this triumph we congratulate ourselves that every part of Latin America has a share. It is another grand proof of the delectable fecundity of republican ideals — another happy interpretation of the true republican spirit."

But, after these eloquent expressions of adhesion to the aims and aspirations of the convention, the distinguished author and publicist insinuates — indeed, does more than insinuate — that these ideals will not have much real fruition; he evidently regards some of the stipulations as altogether impracticable, though exceedingly "fair to look on" — as pretty as the Dead Sea fruit, but just as useless. They were formulated by men ripe in knowledge, no doubt, and perhaps riper still

in imagination — so thinks Mr. Urrutia — but they are to be regarded much as a good-humored man of the world would regard some of the early dreams of Shelley, some of the humanitarian doctrines of Tolstoy; and he alleges some serious difficulties which, according to him, have arisen in Central America since the promulgation and development of that which had so bright a beginning at Washington.

We do not know to what difficulties Mr. Urrutia refers. It is true, there have not been wanting presages of disturbance; but, through the Court of Arbitration, these came to nothing. One case there was of much notoriety, which was pregnant with menaces of international rupture; but it was submitted to the court, and the sentence pronounced has been considered decisive. We are more hopeful than Mr. Urrutia is, with respect to the practical benefits of the Washington Convention; and we firmly believe that the Court of Arbitration will do all for Central America that the most sanguine of its advocates may hope and expect.

The other point on which we disagree with Mr. Urrutia is the opinion that the Supreme Pontiff may, with advantage to the powers, be constituted an universal arbitrator, to whom should be subjected all international disputes and complications. We do not mean to hint the slightest imputation on the virtues and the wisdom which are generally associated with the See of Rome, and the memory of which will be an everlasting aureole around the heads of the successors of St. Peter; we mean no disrespect whatever to the many hierarchs whose encyclicals have disseminated light, and whose various personal gifts have shed luster on the annals of the Vatican; but, we must say that, in our opinion, the time is at hand when the nations ought to carry their differences and contentions before specially constituted courts — courts of a strictly judicial character, instead of submitting them to diplomatic or to ecclesiastical dignitaries, however wise and however powerful these personages may be; and, we can not help remarking that it is rather strange to imagine even the faintest shadow of Hildebrandism arising in the full light of this twentieth century.

We will not terminate these few observations without offering to His Excellency, Francisco José Urrutia, our most heartfelt congratulations on the eminently useful and important work which he has presented to the scientific congress of Santiago.

LUIS ANDERSON.

International Arbitration as a Substitute for War between Nations. By Russell Lowell Jones. With a preface by Professor Bernard Bosanquet. St. Andrews: University Press. 1908. pp. 269.

This is an essay to which was awarded a prize offered in 1907 at the University of St. Andrews, by Mr. Andrew Carnegie, Rector of that University. Mr. Jones devotes his attention most largely to an historical sketch of international arbitration; and greatly overemphasizes the importance of early arbitrations, which have little bearing upon the present political organization of the world. Relatively little space is given to recent developments in the field of international arbitration; practically no attention is devoted to recent arbitration treaties aside from those of the Hague Conferences, and there is no discussion of the commercial and financial forces operating against war.

Mr. Jones expresses sensible views regarding the limitations of arbitration as a means of avoiding war, but his book is in places so narrow in tone, and the author has succeeded in accumulating such a mass of misinformation within the brief space at his disposal, that the work as a whole can not be said to be a valuable addition to the literature of its subject; it will certainly not help very much if at all to an understanding of the problems of international arbitration. It is interesting if not instructive to be told that an arbitration took place between Spain and Switzerland in 1570 "in reference to a *man* called Francke Comté." (p. 130.) Similar errors appear in great numbers throughout the book. A careful revision of the manuscript and more careful proof-reading would have improved the book, but its primary defect lies deeper — the author does not show an adequate knowledge of international law and of the general principles of diplomatic practice.

The book abounds in odd words and foreign phrases, and is wanting in a sober and dignified style. It displays what may be termed the assumed cleverness of an unpracticed writer. The book has neither table of contents nor index.

W. F. Dodd.

L'Évolution de l'Arbitrage International. By Thomas Willing Bach. Philadelphia: Allen, Lane and Scott, 1908. pp. 108.

Arbitration as a means of settling international disputes is in the blood of the Balchs, for Thomas Balch, the author's father, during the twelvemonth following the destruction of the *Alabama* by the *Kearsage*

proposed to settle by arbitration the so-called "Alabama" claims in the course of conversation with distinguished specialists in international law, in an interview with President Lincoln, and in the columns of the *New York Tribune*. Rejected at the time by President Lincoln, wholly unacceptable to Great Britain as involving a question of honor, it was reserved for General Grant, a soldier by training, and the commander-in-chief of the American armies, to conclude the treaty of Washington, May 8, 1871, which laid down the rules for the decision of the "Alabama" claims, and referred them to international arbitration at Geneva. The victor of Appomattox saw war and knew that while fitted to decide a question of strength between contending parties, it was unfitted to decide a question of right. It may also be remarked in passing that General Washington, who had had a practical experience in the field of more than seven years as commander of the revolutionary forces, not to mention his service in the French and Indian wars, negotiated the first modern treaty of arbitration, namely, Jay's treaty of 1794, which submitted outstanding disputes between Great Britain and the United States to arbitration. Familiarity does indeed breed contempt.

Mr. Balch has devoted himself for years to the subject of international arbitration and the monograph on the evolution of international arbitration is an expansion of a previous monograph. In its present form the text appeared in the course of 1908 in the *Revue de droit international et de législation comparée*, and the author has collected the articles, slightly revising them, for the beautiful limited edition of 165 copies, which he has had printed in Philadelphia. Mr. Balch in his preface states that he has the intention of developing the theme more amply. We wish him success, for the present study is a good outline of a large and increasingly important subject which demands careful, patient analysis and elaboration.

Mr. Balch has dedicated his monograph to the memory of Émeric Crucé, "who proposed in 1623, in the *Nouveau Cynée*, the establishment at Venice of an international court, to adjudge the differences between all the nations of the world," and he devotes careful attention to Crucé and his remarkable work.

Mr. Balch may be considered an expert on Crucé, for in 1900 he published a monograph upon him, and is thoroughly familiar with Ernest Nys's "*Études de droit international et de droit politique*" (1890), in which the learned Belgian authority identified the author of the *Nouveau Cynée* with a French scholar of note. It has been frequently asserted

that only one copy of the *Nouveau Cynée* is known to exist, namely in the Bibliothêque Nationale of Paris, but it is known that Charles Sumner possessed a copy, because in a footnote to the "War system of the commonwealth of nations" (Mead's Edition of Sumner's Addresses on War, 1904, p. 196, note 2), Mr. Sumner stated that "a copy, found in one of the stalls at Paris, is now before me." By bequest Harvard College came into possession of it where it now is. Mr. Balch calls attention to this fact on page 21.

Mr. Balch examines acceptably *Le Grand Dessein* attributed to Henry IV, although known to us only by the account of his minister, Sully, [pp. 16–20]; the *Nouveau Cynée* of Crucé, and the proposed constitution of the international assembly at Venice for the settlement of international disputes by arbitration [pp. 20–29]; but devotes scant space to the masterpiece of Grotius which, nevertheless, proposed in express terms a conference for the settlement of international disputes by strangers to them. (*De jure belli ac pacis*, Book II, Chap. xxiii, Sec. 8, paragraphs 1–4). Mr. Balch mentions the famous letter of Leibnitz to St. Pierre mentioning the *Nouveau Cynée*, "*The Discreet Catholic*" by the Landgrave of Hesse-Reinfels, (1666); Penn's *Essay* (1693); all of which he considers inferior to Crucé's project of 1623. He likewise calls attention to one of Cromwell's treaties of Westminster [p. 33]; St. Pierre's *Paix Perpétuelle* (p. 34); Jeremy Bentham's project, and Emanuel Kant's *Perpetual Peace* (p. 35). It does not seem to the reviewer that Mr. Balch has adequately considered these various projects because even admitting his thesis that they are singly or collectively inferior to the project of Crucé, they have nevertheless exercised greater influence upon arbitration and the peace movement than the *Nouveau Cynée* which even to-day is only known to the select few. Mr. Balch then considers Jay's treaty of 1794, and while he describes the arbitrations under articles 5 and 6, he curiously omits all reference to article 7, the only one of the arbitrations which was really successful, which proved arbitration to be not merely a judicial means, but a means calculated to settle acute disputes between nations without resort to force. The author considers at great length, considering the size of the monograph, the preliminaries to the Geneva award (pp. 43–66); and the same may be said of his treatment of the Fur Seal Arbitration of 1893 (pp. 70 et seq).

Mr. Balch's monograph shows that he is well read in the writers on arbitration — although one is astonished to find no reference to Pro-

fessor John Bassett Moore's monumental *International Arbitrations* — and that he appreciates fully and accurately the role which arbitration may play in the settlement of international disputes. It is to be hoped, however, that when he produces his larger work on the subject he will deal not merely with the evolution of the idea but by an examination and analysis of the concrete cases show how frequently arbitration has been resorted to, the large and increasing category of questions it has settled satisfactorily and how far it may be considered a judicial and adequate means for settling all controversies of a legal or judicial nature. Mr. Balch no doubt possesses this information and such a book may well be expected from him.

JAMES BROWN SCOTT.

La Doctrine de Drago. Par H. A. Moulin, Professeur de Droit International Public à l'Université de Dijon. Paris: A. Pedone. 1908. pp. xii, 368.

The famous note of December 29, 1902,[1] sent by Señor Drago, the eminent Minister of Foreign Relations of the Argentine Republic, to the Argentine Minister at Washington, with instructions to communicate its contents to the United States government, has given birth to quite an extensive literature, including several books and articles by Dr. Drago himself. The best and most thorough treatment of the subject is contained in the work under review.

It may be recalled that, alarmed by the blockade of the Venezuelan ports by Great Britain, Germany and Italy at that time, Señor Drago suggested that the United States adopt or recognize the principle that "the *public* debt can not occasion armed intervention nor even the actual occupation of the territory of American nations, by a European power." His article was based on political and juridical grounds, the main legal argument being that "it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it" — a proposition supported by the weighty authority of Alexander Hamilton.

At the third Pan-American Conference held at Rio de Janeiro in the summer of 1906, a resolution was unanimously adopted that "the Governments represented at this Conference be recommended to consider the

[1] For the English text of this note, see Supplement to AMERICAN JOURNAL OF INTERNATIONAL LAW (1907), pp. 1–6.

advisability of inviting the Second Hague Peace Conference to examine the question of the compulsory collection of *public debts*, and in general, the best means tending to diminish among nations *conflicts of purely pecuniary origin*."

The Porter Resolution,[2] which was fathered by the United States and adopted at the ninth plenary session of the second Hague Conference as a separate convention by a vote 39 yeas and 5 absentions, merely declares (article 1):

> **The Contracting Powers agree not to have recourse to armed force for the recovery of *contract* debts claimed from the government of one country, by the government of another country as being due to its nationals;**

but

> **this undertaking is only applicable when the debtor shall refuse to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.**

It will thus be seen that the "Porter" convention differs very materially from the Drago Doctrine proper. It is much narrower in that it does not forbid the use of armed force in the cases above specified, and it is broader (although this interpretation is not free from doubt) in that it applies not merely to *public debts* or loans, but to all debts of a *contractual* nature between states and foreign nationals (in which term foreign syndicates or corporations are doubtless included).

It is necessary to bear the facts outlined above in mind in order that we may properly appreciate M. Moulin's important work on this subject.

As stated in the preface, "this book is not a work wholly original or personal. It is a collection of articles and documents concerning the Drago Doctrine." Upon a controversial subject of such great contemporary interest, the author has deemed it preferable to publish a "book of documentary character" rather than to write a "dogmatic treatise." Would that many more would follow his example!

[2] By referring to the table of signatures appended to the Hague Conventions of 1907 (see 2 AMERICAN JOURNAL OF INTERNATIONAL LAW, pp. 876, 877), it may be noted that only thirty-four states had signed the Porter convention up to June 30, 1908, the final date set for the signatures of the plenipotentiaries. Among the ten who did not sign are Brazil, China, Sweden, Switzerland, and Venezuela. Many of the signatory states agreed under such reservations as to greatly weaken the force of the convention. It may be seriously doubted whether, under these conditions, the Porter convention is to be regarded as an integral part of positive international law.

Yet a good portion of the work (and perhaps the best part of it) consists of M. Moulin's own contributions to the subject. Out of 346 pages, he contributes 137.

The first article is a reprint of one by Dr. Drago himself, entitled "State Loans in Their Relation to International Policy." Comment upon this article seems unnecessary, inasmuch as an English translation appeared in the American Journal of International Law for 1907 (1:692–726).

In a long and very remarkable article originally contributed to the *Revue générale de droit int. public* (t. XIV, pp. 417–73) for 1907, M. Moulin subjects Drago's views to a searching and thoroughgoing criticism and traces the relation between the Drago and Monroe Doctrines. Although he finds the Drago Doctrine sound in principle as well as in policy, he severely criticises the juridical argument based on a highly abstract and now practically obsolete conception of the nature of sovereignty with which the distinguished author of the doctrine supports it. He has convinced the reviewer that Dr. Drago's distinction between public loans as acts of sovereignty which cannot be called into question, and ordinary contracts which are actionable and therefore proper subjects of diplomatic claims (*i. e.* in case of a denial of justice) is unsound in theory and untenable in practice.

The author's discussion of "International Sanctions of the Responsibility of States in Bankruptcy" is equally convincing. He rightly maintains that war should be "a supreme proceedure to which states may only have recourse after the failure of every other solution of their differences," and that claims of a pecuniary nature belong to the "category of those *minima* which can not constitute a *casus belli*, unless it be under exceptional political circumstances." (pp. 121 and 122.) He points to international arbitration as the proper mode of settling such disputes (see article 16 of the First Hague Convention), and claims that war or the application of armed force can only be regarded as a proper sanction of international law and an instrument of international justice when it is reduced to the role of a means of execution. "For small states, war is never a guarantee, it is always a menace."

M. Moulin regards the Drago Doctrine as a corollary of "logical and necessary consequence of the Monroe Doctrine" whose history he sketches and of which he is a strong champion. Very interesting is his appreciation of its international value and its relation with the principles of democracy and nationality.

Two articles by United States publicists are included in this collection: An article by Mr. G. W. Scott on "International Law and the Drago Doctrine" published in the North American Review for 1906 (183:602–610); and an article on "The Calvo and Drago Doctrines" by the reviewer which appeared in the American Journal of International Law for 1907 (1:26–45).

Among the numerous documents printed in this work are the Drago Note of 1902, various documents relating to the third Pan-American Conference of 1906, and numerous speeches and discussions, etc., of the Porter resolution at the Second Hague Peace Conference. The reader will find practically all the important documents bearing on the subject in this book.

The concluding chapter is an appreciation of the Porter convention of 1907 by the author. Among the important questions discussed are the following:

(1) Does the convention authorize the use of armed force in the collection of pecuniary debts based on torts? This might at first sight appear to be the case, but the discussions at The Hague show that such was not the intention of the authors of the Porter resolution. The reviewer agrees with M. Moulin that it would have been much better to have included them. Indeed, it is to be regretted that the Porter convention was not drawn on the lines of the broader Calvo instead of the narrower Drago Doctrine, and that it does not expressly prescribe arbitration for all private claims of a pecuniary nature. In the formulation of the doctrine Señor Drago appears to have been influenced by his opinion that public loans are acts of sovereignty in a peculiar sense for which a state can not be held internationally responsible; but this view is now shown to have been pernicious as well as erroneous. The United States appears to have acted from diplomatic motives.

(2) What is the meaning of the phrase "contract debts?" Does it exclude or include "public" debts or loans? Dr. Drago contended that public loans are not included in the category of contract debts. M. Moulin shows that this contention is not justified. The American delegation seems to have had somewhat hazy ideas on this subject, as shown by the changing terminology of the successive editions of the Porter resolution. On the whole, our author concludes in favor of the view that the term "contract" debts as used in the convention includes "public" debts. This view might have been reinforced by a study of the use of the phrase in Moore's Digest. (See Vol. VI, §§ 995–997.) Here, too, we share

the regret of M. Moulin that the convention was not drawn up in a more scientific manner, *i. e.*, with more regard to the juridical meaning of the words employed.

(3) Does the Porter convention furnish us with a case of obligatory obligation? Absolutely speaking, no; practically, yes. It imposes upon the creditor nation the obligation of offering to arbitrate; but the debtor state has legally the option of resistance.

In spite of its imperfections, however, our author rates the value of the Porter convention very highly. It organizes in as efficacious a manner as possible the protection of the debtor states, it forestalls the danger of financial intervention, it strengthens the force of the Monroe and Drago doctrines.

Whether regarded as a whole or examined in detail, this work strikes us as excellent and altogether admirable. Its only serious defect, from the reviewer's standpoint, is that it gives him practically no ground for adverse criticism and fault-finding. The only positive error which we have noted is the misprint of the word *originaires* for *ordinaires* on page 317. It contains a very complete bibliography which even includes a list of newspaper articles. The author has apparently exhausted every possible source of information. But such is the custom in France and Germany.

No student of international relations, more especially of the relations between Europe and Latin America, can afford to ignore this work.

AMOS. S. HERSHEY.

The Mystery of the Pinckney Draught. By Charles C. Nott, formerly Chief Justice of the United States Court of Claims. New York: The Century Co. 1908. pp. 334.

The admitted facts in connection with the Pinckney draft may be stated as follows: On May 29, 1787, the same day that Governor Randolph submitted the Virginia resolutions to the Federal Convention, "Mr. Charles Pinckney, one of the deputies of South Carolina, laid before the house for their consideration the draft of a federal government." Both papers were referred to the Committee of the Whole House. The Virginia resolutions became the basis of the discussion for the next two months, while the Pinckney plan, so far as the records show, was not referred to by any one but its author. On July 24, a Committee of Detail was chosen for the purpose of drafting a constitution and to it

were referred twenty-three resolutions which had been agreed on, together with the Pinckney draft and the Patterson proposals. Two days later the Convention adjourned until August 6 in order to give the committee time to put the resolutions in shape. On the day set the committee submitted to the Convention printed copies of its report, which after discussion and amendment was later referred to a committee for revision and finally adopted as the Constitution of the United States.

When John Quincy Adams, as Secretary of State, was preparing the journal of the Convention for publication in 1818, no copy of the Pinckney draft was found among the papers of the Convention then in the Department of State. After applying to Madison for a copy and finding that he had none, Adams wrote to Pinckney, who replied that he had among his papers four or five rough drafts of his plan, and that he could not be absolutely sure which one was presented to the Convention, but that they were substantially the same and that he sent the one which he believed to be the document wanted. The draft submitted was written with the same ink and on the same paper as the letter, and the paper bore the water-mark of 1798. The draft thus obtained was printed in the official journal in 1819, in Elliot's *Debates,* in the *Documentary History of the Constitution,* and in other editions of the Convention papers. If this draft was the one presented to the Convention in 1787, then Pinckney is entitled to the credit of being the principal author of the Constitution.

For several years the draft appears to have gone unchallenged, but about 1830 Sparks and other investigators appealed to Madison to know if it was genuine. He stated in numerous letters and conversations that it was not, holding that the evidence against it was "irresistible," and he also prepared a *Note* to accompany his *Journal,* in which he called attention to certain discrepancies between the draft and the views advanced by Pinckney on the floor of the Convention. In order to avoid a direct charge of bad faith he ventured the explanation that the original document having been lost, Pinckney resorted for a copy to "the rough draft, in which erasures and interlineations following what passed in the Convention might be confounded in part at least with the original text, and after a lapse of more than thirty years confounded also in the memory of the author." Madison's view of the case has been generally accepted by historians.

In the volume before us Judge Nott holds a brief for Pinckney. He approaches the subject as an advocate rather than as an historian, and

his argument, though ingenious, fails to carry conviction. He assumes the genuineness of the document which Pinckney sent to Adams in 1818 and undertakes to explain away or reconcile all facts that are against it. He rejects Madison as a witness by assuming that Madison was not present when Pinckney read his draft and therefore was not aware of its contents. He points out the close resemblance between the Pinckney draft and the report of the Committee of Detail, a fact first noted by Sparks, and on this fact bases the remarkable hypothesis that the committee, which had only a few days for preparing the report, were so well pleased with Pinckney's draft, which had attracted little attention on the floor of the Convention and which was now carefully examined by them for the first time, that they adopted it as the basis of their report, entered whatever changes they made on the original, and then used it as "printer's copy." This of course would account for the disappearance of the document. But unfortunately for this hypothesis it is not the only explanation of the facts in question. There are other explanations more in accordance with the traditions.

The most serious defect in Judge Nott's argument is the use he makes of a pamphlet published by Pinckney shortly after the adjournment of the Convention, entitled "Observations on the plan of government submitted to the Federal Convention in Philadelphia on the 28th (sic) of May, 1787, by Mr. Charles Pinckney, delegate from the State of South Carolina, delivered at different times in the course of their discussions." Even Judge Nott admits that this speech was never delivered in the Convention. Pinckney had probably prepared it in Charleston before going to Philadelphia, and it was too good to be lost, so he had it published. Judge Nott uses the *Observations* to substantiate the draft where the two agree, but where they are at variance he reminds us that "a speech which was never spoken to a suppositional audience who never heard it, is not a public declaration of the contents of another paper."

It has been shown by Dr. Jameson in the *Report of the American Historical Association* for 1902 and by Professor McLaughlin in the Ninth volume of the *American Historical Review* that Pinckney made a large number of contributions to the Constitution, though mainly in the wording of clauses and in the suggestion of details. He prejudiced his own case by claiming a greater share in the work than he was entitled to, an error which the present volume merely accentuates.

JOHN HOLLADAY LATANÉ.

Die Praxis des Deutschen Reichsgerichts in Auslieferungssachen. By Dr. Jur. Wolfgang Mettgenberg. pp. 47.

This is the reprint of an article which appeared in Volume XVIII (1908) of the "Zeitschrift für Internationales Privat und Öffentliches Recht," and well deserves the attention of all international jurists. Germany possesses no extradition act. The only rule of German law concerning extradition is that in § 9 of the Criminal Code, enacting that a German subject can never be extradited to a foreign state. Apart from this there is no law which in any way restricts the German government in the conclusion of extradition treaties. And in case no treaty of extradition is in existence with the foreign state concerned, it is entirely within the discretion of the German government to grant or refuse extradition in the case of the subject of a foreign state who has committed a crime outside German jurisdiction.

The German empire has entered into treaties of extradition with, I believe, less than twenty foreign states, but in addition there are in existence agreements concerning extradition between some of the member states of the empire and foreign states, as for instance between Prussia and the United States of America since 1852. However this may be, the granting or refusal of extradition rests, throughout the German empire, not with the courts of justice but with the administrative authorities. How is it then possible that a practise of the Reichsgericht could have grown up with regard to extradition, since this court could never have been appealed to as to the question whether or not a foreign individual might be extradited by Germany? The answer to this riddle is derived from two facts. First, according to § 376 of the German Criminal Procedure Act (Straf-process-Ordnung) an appeal on questions of law can be made from certain lower courts (the Land-und Schwurgerichte) to the Reichsgericht. Secondly, according to the practise of the Reichsgericht questions arising from extradition treaties of the empire, as well as of the member states, are considered to be questions of law in the sense of the above quoted § 376 of the Criminal Procedure Act. Therefore when an individual extradited from a foreign state to Germany is upon his trial before a German court, and when the verdict of such a court, in the opinion of either the prosecutor or the counsel for defense, violates the extradition treaty concerned, an appeal can be brought to the Reichsgericht. It is in this way that a practice of that court has grown up with regard to cases of extradition, and Doctor Mettgenberg now analyses all these cases and brings out the leading principles underlying

the decisions. The author's work is admirable in every way. There is thoroughness and soundness of method, precision and clearness of language, and moderation but firmness of criticism. All together, the article is a model of its kind. In studying the author's pages the reviewer has more than ever been confirmed in his long-standing conviction that the time can not be far distant, when, in place of the hundreds of extradition treaties at present existing between single states, there will be brought into being one single but universal treaty, which will codify the international law of extradition in a way demanded by the requirements of modern life and intercourse. A universal extradition "Union" would then be added to the number of the international "Unions" already in existence. Controverted points arising from such a universal treaty of extradition could fitly be settled by the Hague Court of Arbitration.

L. OPPENHEIM.

Le Consul: Fonctions, Immunités, Organisation, Exequatur. Essai d'Exposé Systématique. By Ellery C. Stowell. Paris: A. Pedone. 1909.

Doctor Stowell disclaims any intention of offering this work as a practical guide for the use of consuls, which field is adequately covered by the works of de Clercq and Vallat in France, Koenig in Germany, and others elsewhere. His purpose is to supply the need for a scientific treatise relative to consuls, with special reference to their juridical character. He offers here a systematic arrangement for the study and classification of consular functions, immunities, and organization. That he has succeeded admirably in this difficult task will be apparent to anyone who reads the book from cover to cover.

While Doctor Stowell recognizes that a work of such technical character will appeal to a comparatively limited number of persons — mostly those students who desire to specialize in this branch of the political sciences — he believes that, inasmuch as the essential principles which govern the subject remain practically the same notwithstanding that the number and nature of consular duties vary considerably according to the different conditions of commerce and international relations, the systematic plan which he presents should have both utility and interest to those who are determined to study the subject intelligently and thoroughly.

The first feature which attracts the reader is the unsuual circumstance that this work by an American citizen is written throughout in classic

French, a language selected not only because it is the traditional medium used by diplomacy, but also because the work was originally prepared by its author in qualifying himself for the degree of *Docteur en Droit* of the University of Paris. In this connection it is interesting to recall that the great work of Alexander de Miltitz entitled "Manuel des Consuls," published in 5 volumes in London and Berlin in the years 1837–1842, was also in the French language, although its author was the Chamberlain of the King of Prussia and former Minister to the Ottoman Government. The work of de Miltitz remains the standard description of the origin and development of the consular establishments of the principal countries of the world.

The fact that the United States government has recently subjected its consular service to a thorough reorganization and reform along the most improved lines of the consular establishments of foreign countries, and the further fact, no less important, that the president is making a systematic effort to appoint as consuls only those men who have shown by their examination, both written and oral, under the provisions of the Reorganization Act of 1906, that they possess the proper educational and personal qualifications, should enlarge materially the circle of readers of a scholarly book like Doctor Stowell's. To one who would understand the subject thoroughly it is as important to know the scientific relation between the different consular functions as it is to know the historical details of the development of the judicial and administrative institutions created for the utility of commerce, which are so ably presented in the excellent work by de Miltitz above referred to.

Doctor Stowell's plan of treatment is to discuss in order (1) the consular functions; (2) the immunities and privileges which permit the consul to exercise these functions; (3) the organization of the consular service, which is necessary for the direction of the activity of the consul and for maintaining him in the enjoyment of his immunities and privileges; (4) the formalities of qualifying and taking charge, and the conditions regulating the grant of the exequatur, which enables the consul to discharge his functions; (5) the termination of his functions, and, lastly, (6) a definition of "the consul" derived from the study of all the preceding features.

By reserving the definition of a consul to the last, instead of presenting it at the outset of the work, the author pursues a unique plan, which arrangement may appear as strange to some readers as if he were to present the preface at the close of the book. There is, however, logic

in this arrangement. If the analytical method which Doctor Stowell has adopted is correct, it will lead logically to a definition which will comprise all the constituent elements of the character of the consul. Let us see how this definition reads, which is the culmination of Doctor Stowell's investigations; a free translation would be as follows:

> A consul is a public official appointed by one state to act, with the consent of another state, within the jurisdictional domain of the latter. His mission is to watch over and protect, in accordance with the special treaties of the two states and with the general principles of international law, the national or individual interests which his government judges proper for him to uphold. Finally, he discharges in the foreign country the very diversified functions of numerous public officers, whose services would have been either indispensable or useful to his countrymen in the foreign country, or, more simply, of advantage in any commercial or civil transaction which concerns his country or nationals.

The foregoing definition, although elaborate and perhaps the logical deduction from the analytical treatment of consular functions and immunities which precedes it, is, nevertheless, somewhat disappointing. In the first place, its main features are applicable alike to the description of a diplomatic or a consular officer. It fails to lay stress upon the representative character of the consular officer in respect of the commercial interests of his countrymen in the foreign jurisdiction, and it fails to refer clearly to the grant of the exequatur or permission given by the foreign government to the consul to act in its territorial jurisdiction, as distinguished from the doctrine of *persona grata* governing the reception of diplomatic officers. Moreover, it should be borne in mind that many of the non-commercial functions performed by the consular officer are those which belong primarily to the diplomatic officer and which the consul performs as auxiliary or subordinate to the diplomatic officer. For example, no graver function falls to the lot of the consul to perform than the protection of those personal rights of his countrymen which are guaranteed by the local law and by treaties between his own government and the foreign government; but we must not overlook the fact that in discharging this important duty the consul acts in an auxiliary capacity to the diplomatic officer, whose duty it is to intervene with the foreign government and make any representations which the circumstances of the case may justify. One is apt to gather the idea from the definition above quoted that the duties of consuls in connection with political matters are on the same footing as the duties of diplomatic officers in respect of those matters. It would seem that the definition of a consul should make the

line of cleavage between himself and the diplomatic officer sufficiently clear to permit of no misunderstanding.

In the first part of his work, which is devoted to the "Consular Functions," the author points out the difficulties in adopting a scientific classification of those functions which shall be of practical value. Take, for illustration, the subject of extradition. Some writers, notably M. Renault, include it under the head of public national law, while others, like M. Laine, treat it under private international law. One classification of the functions which the writer suggests is as follows:

(1) Functions in which the consul acts adversely to the interests of the foreign state;

(2) Functions in which he acts in accordance with those interests; and

(3) Functions in which his action is limited to the interests of his country without their affecting the foreign state in any manner.

Under the head of "Organisation" the writer makes some interesting suggestions for the improvement of the consular system — not necessarily of the United States, but of any country. He believes that the best way of satisfying the legitimate and constantly increasing demands of other departments of the government than the Foreign Office, with a view to protecting their interests abroad through the medium of consuls or other similar agents, would be to reorganize the consular service by establishing, in the principal centers, special agents to be placed under the authority of the ministry of foreign affairs. These agents would obey the instructions of their respective departments and watch over their interests, excepting in cases where the department of foreign affairs should fear that friendly international relations might be compromised by their action. There could be, in this respect, no serious conflict between the different departments. The minister of foreign affairs would have the last word and the power to call these agents to account when he should judge necessary, except that he would leave them, as a rule, free to correspond directly with the other ministries, in order to enable them to give more special attention to the needs of their respective departments. Reservation, however, would necessarily be made for faults requiring discipline, although in these cases the other departments could perhaps protect their interests by the creation of a corps of inspectors, whose duty it would be to visit at unexpected times the personnel stationed in foreign countries.

The book contains some interesting material in the appendices, which

furnishes general confirmation of the principles outlined in the text. The multifarious duties of American consuls are shown by selections from an official report submitted by the Department of State to the Senate in 1902, with specification of the duties incident to officers at particular stations in various parts of the world. Extracts are also given from Parliamentary papers in regard to the British consular establishments in 1835, 1871, and 1903. These appendices are, of course, in the English language. There are also presented the regulations on consular immunities adopted by the *l'Institut de droit International* at its session of September 26, 1896. The work closes with an extremely well selected bibliography.

JOHN BALL OSBORNE.

Die Grundlagen des Revolutionären Pacifismus. By Alfred H. Fried. Tübingen: J. C. B. Mohr (Paul Siebeck).

It is not easy to give a clear idea of the development of Mr. Fried's thought in this closely reasoned little treatise of sixty-eight pages without turning the whole of it into English. It is a study of the peace movement, on which the author has previously written much, from both the philosophic and the practical side. It is thoroughly German in character.

The title, "The Principles of Revolutionary Pacifism," is certainly a novel one. "Revolutionary" generally suggests strife and disorder. Mr. Fried uses the term as signifying simply a supplanting of the causes which lead to war by others which will as inevitably lead to international harmony and peace. Over against "revolutionary pacifism" he sets what he calls "reform pacifism." The latter directs its efforts against war as a phenomenon, the former against its causes. Among reform pacifists he places the anti-militarists of European countries, the "disarmists" among the peacemakers, those of the socialists who oppose army and navy budgets, as well as those who propose to "civilize" war and prevent its outbreak in specific cases, without attempting to eradicate its causes. The revolutionary pacifists, on the other hand, strike at the very roots of war, seek to change fundamentally the attitude of peoples and nations toward each other and to bring about an international political organization, and thus make the whole system of war and armaments finally useless.

In this analysis Mr. Fried does not seem to realize, what is so often emphasized by American and English writers on peace and war, that

armaments themselves are more than symptoms, more than results; that they are, at least in their excessive modern development, also very serious causes, and that they tend powerfully to keep alive the false and mischievous international attitude which revolutionary pacifists would eradicate.

The distinction into reform and revolutionary pacifists does not seem to have as much practical value as Mr. Fried would make us believe. All the great peacemakers of the past century as well as those of today, have sought to have the causes of war and of armaments eradicated, through the transformation of men's ideas about it and through the development of rational and friendly relations among governments and peoples. They have never limited themselves simply to protesting against war as a phenomenon, and demanding its disappearance. They have always urged the establishment of adequate substitutes for it, and the peace movement, in its present practical stage of international organization, is following the lines marked out by them three-quarters of a century ago.

Mr. Fried's treatment of the prevailing "anarchy" among the nations, as the cause of armaments and danger of war, is excellent as far as it goes. But it hardly goes deep enough. There is something below the lack of international organization, for which he pleads so strongly, which will have to be removed — which is in fact being removed — before the anarchy will disappear and with it overgrowth of armaments and danger of war. This something is the false notions, the selfish feelings, the greed and ambitions of men. These are the real causes of international anarchy and lack of organization, and their disappearance must precede in measure any effective international organization.

The sections of the work on arbitration, disarmament, war and peace, and international organization, are all instructive. In the final thirty pages, which are devoted to "Action," Mr. Fried develops the idea that the world is already organizing itself, and that the true method of the pacifists is to work in harmony with the social forces, which are inevitably bringing about the unity of the world, as well as against the forces of disintegration and anarchy. He lays stress on commerce and personal intercourse between peoples, on international expositions and congresses, on the development of international law, the removal of national prejudices by enlightment, and the like, as the most effective means of bringing about the organization and peace of the world.

BENJAMIN F. TRUEBLOOD.

The Law of War between Belligerents: A History and Commentary. By Percy Bordwell. Chicago: Callaghan & Co. 1908. $3.50 net.

The work consists of 331 pages, besides appendices and index. It is the first fruits of Mr. Bordwell's studies in International Law to appear in permanent shape, being in fact, it is believed, his thesis for the degree of doctor of philosophy which he has recently received from Columbia.

To be briefly biographical, Mr. Bordwell took a degree at the University of California (B. L.) in 1898, was a student in public law at Columbia University 1898–1900, Schiff Fellow in International Law, 1900 to 1901; and student in the law school of that university 1901–1904, when he took his degree of bachelor of laws. He practiced law for two years, then served as assistant professor of law at the University of Missouri until 1908 when he was advanced to a professorship.

The volume deals with "the law of war as between belligerents" but the author hopes to publish a second volume dealing with "the law of war as affecting neutrals" and eventually a third "on amicable means of settling international disputes." It may be mentioned that the Law Times of London for May 1st devotes twenty lines to a review of Mr. Bordwell's book, but mistakes his name, printing it "Bondwell."

The present volume aims, first, to give a history of the development of the law and practice of war, especially, as developed through the great international congresses and conferences and to deal fully with the practice in recent wars as the Franco-German, South African, and Russo-Japanese wars in the light of international law; secondly, to "be a thorough commentary on war practice between belligerents." It aims further to be a study in law to interest the general reader and to serve as a manual for army and navy officers and the fact is recorded that General George B. Davis, Judge Advocate General of the army of the United States, read an earlier stage of the manuscript of the work.

The first part of the book is divided into fifteen chapters dealing with different periods as "Before Grotius," "Grotius and his Time," and with various wars as "The Revolutionary and Napoleonic Struggles," our "Civil War," the "Franco-German" and "South African" wars.

The second part is in nine chapters dealing with "Commencement of War," "Enemy character and property," "Qualifications of belligerents," "Prisoners of war," "the Sick and wounded and shipwrecked," "Means of offense and defense," "Non-hostile intercourse of belligerents,"

"Military occupation," "Rights and duties as to persons," and "Rights and duties as to property."

It may be said that it bears the marks of a student, of intelligence and industry who has browsed freely in the library of his university. The references are sometimes to secondary sources and are not always as copious as could be wished. The style is clear and engaging and the reader often wishes the discussions of the topics taken up were not so brief.

There is no table of cases, a lack which a lawyer feels. The work has its principal interest, perhaps, as a much abbreviated but comprehensive resumé of facts, practices and decisions, resulting from recent wars and conferences which are not easily found elsewhere collected in one small volume. It is of a type, probably due to the need of brevity, more esteemed by army and navy officers to whom law is a minor study than by the more "long-winded" brethren of the bar, to whom it is a life pursuit. However, it certainly contains much of interest for all students of international law.

In its discussion of the transactions in the South African and Russo-Japanese wars, especially, it collects much which is not yet trite or easily accessible and, as to the former, makes frequent references to official documents.

As appendices Mr. Bordwell prints a summary of an article by Professor Akiyama of the regulations and instructions of Japan as to Russian subjects during the late war. The article also gives most interesting facts and statistics as to the actual treatment accorded to the Russian prisoners of war and the showing is most creditable to the Island Kingdom.

He also prints the conventions of the second Hague Conference as to laws and customs of war on land and as to discharging projectiles from balloons. Mr. Arthur K. Kuhn in a paper read before the American Political Science Association last December called attention to the fact that this declaration had "been ratified among others by Great Britain, Austria, and the United States, but though the period for ratification expired June 30, 1908, seventeen nations have failed to give assent, among them France, Germany, Italy, Japan, Mexico and Russia." Some note of this would have been of value in Mr. Bordwell's treatment of the topic, which recurs no less than four times in the work.

Among changes discussed may be mentioned the belief expressed that the well known case of Bentzon v. Boyle, 9 Cranch, 191, as to the

products of a Danish Island held by the British being British goods though the owner had removed to Denmark, in which Marshall wrote the opinion, would now be decided the other way, as under the late Hague Convention "conquest which effects such a change can now only take place on the conclusion of hostilities."

Also the fact that under the rules adopted at the second Hague Conference an alien enemy can now sue, and that therefore there is no longer any reason why war should suspend the running of the statutes of limitation (page 210). This reviewer doubts whether the reasons for suspending the running of the statutes of limitation, or the kindred rule as to cessation of interest as to debts owed between belligerents separated by the line of war, are done away by the provision that an alien enemy may sue, unless that carries with it also the right to freely communicate and transmit and receive payments across the line of war. It seems hardly possible that it carries privileges so wholly inconsistent with a state of war. The language of the convention of 1907 as to laws and customs of war on land forbids a belligerent nation "to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

The writer finds it difficult to see how an alien enemy within the line of the enemy can avail himself of the privileges here indicated and with deference suggests that it must be mainly, if not wholly, limited to alien enemies within neutral or friendly territory or those represented within such territory by agents, duly authorized prior to war becoming flagrant.

To speak of minor details some errors in proof reading have been noticed, as the repeated omission of the accent on the final "e" in the name "Pradier Fodéré" (see list authorities page xxiii and pages 88 and 112); "fisherman" for "fishermen" (page 64); "King's Beach" for "King's Bench," (page 216). However, it is pleasant to find the name of Mountague Bernard, the eminent English scholar, correctly spelled, though so many of our writers omit the first "u" in the christian name.

The work is as a whole characterized by admirable fairness, dignity and simplicity. The style is clear and the statements confident without being dogmatic and the method agreeable and conciliatory. Mr. Bordwell meets questions of doubt or change very candidly and does not hide behind ambiguities.

Professors Westlake and Holland, the Nestors of the international bar of England, have written and published volumes on the laws of war within little more than a year past. Mr. Bordwell has freely quoted

these authorities though he can not yet speak with their assurance and convincing force. He may be congratulated, however, on having thus early contributed a work of merit and permanent usefulness upon a subject of international interest.

CHARLES NOBLE GREGORY.

Extradition. By Sir Edward Clarke. 4th edition prepared by the author and E. Percival Clarke. London: Stevens and Haynes. 1903.

This work is divided into two parts; the first, the treatise upon the subject; the second, an appendix. The treatise is divided into eight chapters, (1) theory of the subject; (2) early treaties and cases; (3) history of the law in the United States; (4) history of the law in Canada; (5) history of the law in Great Britain; (6) history of the law in France; (7) rules of practice in the different countries; (8) conclusion.

The appendix purports to contain the extradition acts of Great Britain, including Canada, and the United States, together with a list and texts of existing British extradition treaties; a list of United States extradition treaties; demands made by Great Britain on France, 1852–1865; note upon the Lamirande case; and note upon political offences.

It is somewhat difficult to determine the exact purpose which the author had in mind in preparing this work. His own statement is "the constant, although of course not very large, demand for a trustworthy book upon the law of extradition has required the preparation of another edition of this work." As will be noted from the outline given above the author has attempted to cover the law of extradition as it exists in the United States, France, and Great Britain, including Canada, and to accomplish all this, including certain theoretical discussions and conclusions, in 263 pages, of which 65 pages are devoted to the law of extradition as it exists in the United States. The result is certainly no better than might be expected.

The only classification of his subject which the author has attempted to make, is geographic, that is, each chapter is devoted to the law of one country. The matter contained in the chapters themselves is entirely unclassified For example, the author while stating that the law of the United States was "in the matter of extradition, until 1870, better than that of any country in the world; and the decisions of the American

judges are the best existing expositions of the duty of extradition, in its relation at once to the judicial rights of nations and the general interests of the civilization of the world," has yet in his chapter devoted to extradition in the United States failed to do more than chronicle in their order various cases which have arisen and been determined in the American courts upon questions of extradition. Moreover, he is guilty of the common, though it would seem unpardonable error, of failing to distinguish between the American federal and state jurisdictions, and so confuses interstate rendition with international extradition. The result is of course misleading as to extradition proper. This discussion of the law in the United States is of little practical value to an American lawyer seeking information regarding the law of extradition as it exists in his own country.

Another feature of the work that is not likely to commend itself to the busy man who seeks to use the book, is that while the name and date of the case are given in the footnotes, the citation of the case is found only in the table of cases and it is therefore necessary in every instance to look to the table of cases to determine, first, whether or not the case cited is an American case; secondly, if American, whether or not it is a state or federal case. If the book were such a one as could be used by the American practitioner this would be a matter of considerable inconvenience.

The matter contained in the appendix so far as the United States is concerned is likewise most unsatisfactory and incomplete. The author has included the acts of August 3, 1882, and March 3, 1883, affecting extradition, but has wholly omitted those laws which were incorporated into the revised statutes as R. S. 5270 et seq., and which set forth the fundamental provisions of our extradition law.

The book as a whole may perhaps be considered as a collection of judicial essays, indifferently accurate, dealing with the historical development of the doctrine of extradition in the countries whose laws are considered.

It is not believed, however, that any American lawyer who already has either the elaborate two volume work upon extradition prepared by Professor John Bassett Moore, or that most excellent little monograph prepared by Mr. Frederick Van Dyne, appearing *sub voce* in "Cyc," would find in this work of Sir Edward Clarke's, anything of particular use or value.

Classics of International Law. Washington: Carnegie Institution.

The Carnegie Institution announces the republication of the work of Ayala, one of the predecessors of Grotius, edited (with translation) by John Westlake, K. C., formerly Whewell professor of International Law of the University of Cambridge; and the work of Zouche, to be edited with translation by Thomas Erskine Holland, K. C., Chichele Professor of International Law in the University of Oxford. It is expected that these will appear in the course of the year. Professor Holland will also prepare for the series the works of Gentilis, an Italian jurist; while a new and critical edition of the following works of Grotius: *De Jure Praedae, Mare Liberum,* and *De Jure Belli ac Pacis,* will be brought out under the personal direction of the general editor of the series, Dr. James Brown Scott. The translation of the Grotius will be made by the Reverend Mr. John G. Maguire, professor of Latin in the Catholic University of America.

Deuxième Conférence de la Paix. Actes et Documents. The Hague: Imprimerie Nationale. 1909. Vol. 2, pp. lxxxviii, 1106; vol. 3, pp. xcvi, 1180, and general index.

In the JOURNAL for October, 1908, (2:972) attention was called to the appearance of the first volume of the official report of the Second Hague Conference, published by the Dutch Government. In May of the current year the second and third volumes, completing the official report, appeared. The second volume is devoted solely to the work of the first commission, that is to say, to the consideration of subjects directly or indirectly concerned with arbitration, and contains the discussions on arbitration, the limitation of force in the collection of contract debts, the establishment of an international court of prize, the project of a permanent court of arbitral justice, and the amendments adopted in the light of actual experience to improve arbitral procedure. In addition, the volume contains the proceedings in the four committees of examination appointed by the first commission to facilitate its labors.

The third and concluding volume is devoted to the second, third and fourth commissions, dealing with land and naval warfare, and the rights of neutrals. This volume is uniform in plan and execution with the second and closes with the brief but adequate analytical index which places the official report at the disposal of the reader and student.

Those interested in the possession of the volumes may obtain them either from Stechert and Co., New York City, or from M. Nijhoff, at The Hague.

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THE MOST-FAVORED-NATION CLAUSE *

German-American most-favored-nation relations: arguments against and for the use of the clause: suggestions

Probably no single treaty containing the most-favored-nation clause has caused more controversy than that made between the United States and Prussia, May 1, 1828. Certainly none has attracted more attention from individuals and bodies other than ministerial. This being the case, and since this controversy and its issue illustrate, in a variety of phases common to no other single instance, the necessity for careful application of certain of the principles and methods of interpretation indicated, it will be profitable to study the history of German-American most-favored-nation relations in some detail.

The treaty of 1828 contains sixteen articles, revived article 12 of the treaty of 1785 and articles 13–24 of the treaty of 1799. Those about which controversy has centered are articles 5 and 9.

ARTICLE 5. No higher or other duties shall be imposed [on the importation into either of products of the other], than are or shall be payable on the like article being the produce or the manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article the produce or manufacture of [either, to or from ports of the other], which shall not equally extend to all other nations.

ARTICLE 9. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

These two articles are practically identical with articles 5 and 9 of the United States treaty with Austria, August 27, 1829, and articles 6 and 11 of the United States-Russian treaty of December 18, 1832.

As indicated above, it has been the view of the German government, put forward repeatedly, that this treaty calls for unconditional

* For the first two sections of this article see this JOURNAL, *3*:395 (April, 1909), and *3*:619 (July, 1909). The bibliography to which footnotes "*op. cit.*" refer, may be found at *3*:396 (this JOURNAL, April, 1909.)

most-favored-nation treatment, and that article 5 is not to be considered as modified by article 9. The American government, on the other hand, has regularly maintained that, while it was the meaning of the treaty that the commerce of the two nations be put on an absolute equality as to favors granted to other nations *pro præterito*, article 9 excludes unconditional most-favored-nation treatment *pro futuro*, and that articles 5 and 9 must be read together. In other words, the American diplomats have maintained concerning this treaty, what they have maintained concerning all, that it was not, and has not been, our policy to make unconditional most-favored-nation agreements, but that all are based on reciprocity.

In order to determine which has been right, it is necessary, as Dr. Glier points out, to consider the circumstances under which the treaty was made and the meaning of similar wording in similar treaties of that period, rather than to depend on the modern arguments presented by the two governments respectively, which invariably start from different premises. What, then, was the understanding at the time the treaty was made? The résumé given in the discussion of the United States practice under the subject of the *History of the clause*[109] leaves no possibility for doubt as to the usual practice of the United States. Three cases occur where the United States has deviated from that course, and has made what cannot but be interpreted as unconditional promises. In the Swiss treaty of 1858, article 10 reads:

> In order the more effectively to attain the object contemplated in article 8 [most-favored-nation treatment] each of the contracting parties hereby engages not to grant any favor in commerce to any nation * * * which shall not immediately be enjoined by the other party.[110]

In the treaty with the Orange Free-State, December 22, 1871, article 7 reads:

> Each * * * hereby engages not to grant any favor in commerce to any nation, which shall not immediately be enjoyed by the other party.[111]

[109] See the JOURNAL, *3*:395, *et seq.* (April, 1909).

[110] This clause is no longer in force.

[111] This treaty lost effect when the Orange Free-State was absorbed into the British Empire.

In the treaty with Servia, October 14, 1881, article 5:

> Neither * * * shall establish a prohibition of importation, exportation, or transit against the other which shall not be applicable at the same time to all other nations.

And article 6:

> * * * also every favor or immunity [concerning importation, exportation, etc.] which shall be later granted to a third power shall be *immediately* extended, and *without condition,* and by this very fact, to the other contracting party.[112]

There are no such promises of immediate or unconditional extension of favors in the Prussian treaty of 1828. Clearly it cannot come in that group.

There are, further, at least five treaties of the United States for which the suggestion might be made, since they do not contain the stipulation for compensation, that they constitute engagements for unconditional most-favored-nation treatment.[113]

These treaties contain such articles as the following:

> No higher or other duties [shall be imposed] on importation or exportation [to or from either * * * from or to the other] and no prohibition [shall be imposed] which shall not extend equally to all other nations.

They do not contain elsewhere the clause requiring the return of equivalents. The United States government, however, not only recognizes no unconditional interpretation and no generalization of tariff concessions but it has held that even where the compensatory clause is omitted, it is to be understood. We may without hesitation accept Dr. Glier's conclusions that none of this second group contemplates unconditional most-favored-nation treatment. But even if these could be added — which they cannot — to the three which are conceded to have contained the unconditional promise, thus making a significant number of exceptions to the general American practice,

[112] See also article 13. This treaty is still in force.

[113] U. S. treaties with the Netherlands, October 8, 1782; Great Britain, November 19, 1794; France, September 30, 1800; Great Britain, July 3, 1815; Hanover, May 20, 1840.

the Prussian treaty does not fall within that number, but belongs to the group in which the majority of United States treaties fall, that is among those containing the compensation clause.

That the American intention in general in making treaties in this latter form has been to apply the conditional treatment cannot be denied. A glance at the correspondence of our Secretaries of State makes this point incontrovertible. What then may have been the intention at the time of the making of this particular treaty? In 1823 Mr. Gallatin had stated explicitly that the idea of the United States of most-favored-nation treatment was on the basis of equivalent compensation. In the year following, 1824, the United States made the treaty with Colombia which introduced the reciprocity principle to South American states. In the matter of tariff policy, the movement toward protection which began in 1816 and set in strongly after 1819, had "reached its highest point in 1828."[114] In 1828 came the treaty in question, with Prussia. In 1829, August 29th, we made a similar treaty with Austria. An opportunity was presented almost at once for our government to declare its position concerning the meaning of this treaty. The opinion which was delivered leaves little to be desired in the explicitness with which it lays down the American view. To the Austrian request for reductions on wines similar to those given France under the treaty of 1831, Mr. Livingston replied in 1832 that it could not be imagined that either party intended to forego the advantages which might be derived subsequently from contracts with other nations for "equivalent reductions." Further, he declared that article 5 and article 9 must be read together, that there was no contradiction between these articles, that article 9 confirmed article 5, and that the two together meant that if duties were lessened in favor of a third nation the second should obtain like reductions for an equivalent.[115] Again, in 1831 came our contention with France over the treaty of 1803 in which our Secretary of State strenuously denied, quoting also from his predecessors, that the United States had made an unconditional most-

[114] Taussig: Tariff History of the United States.

[115] Based on Livingston's note to Lederer, November 5, 1832, Moore, *op. cit.* V: 261.

favored-nation treaty with France. Is it likely that if the United States had had unconditional most-favored-nation treatment in mind in making the treaty in 1828 it would, in 1831, have denied ever having entertained notions of that practice? Would the United States in making a treaty with Russia in 1832 have employed again the same words used in the treaty with Prussia in 1828 and that with Austria in 1829, had it not considered that its declaration in 1831 established its position as to the meaning of its most-favored-nation stipulations? The evidence leaves no doubt as to what was the attitude and understanding of the United States when the treaty of 1828 was made. The Americans had in mind *conditional* most-favored-nation treatment. What then was the idea of the Prussians? Dr. Glier, having shown, as we have indicated elsewhere,[116] that the principle of reciprocity was widely in vogue during this period, and that the conditional form of the clause, in what are plainly reciprocity treaties, was of very frequent appearance, exhibits eighteen treaties of German states with American countries for the period between 1825 and 1860 concerning which he asserts that not one stipulates for unconditional most-favored-nation treatment.[117]

The United States had, previous to 1828, made two treaties with Prussia, one in 1785 and the other in 1799. It had been the policy of Prussia during and after the American revolution — a policy begun by Frederick the Great — to allow merchants of the United States coming to Prussian ports to "enjoy complete freedom and be treated with all the consideration given merchants of other lands." Between 1776 and 1870 the United States made nine commercial treaties with states now included in the German Empire. Beginning with the germs in 1818, in the next decade we encounter a new factor in the rise of the Zoll-Verein. 1828 and 1834 witnessed a wide extension among German states of the policy of removing internal trade barriers, while at the same time establishing new customs duties on the frontier of the Zoll-Verein, duties which were to constitute a "protective barrier against foreign competition." Prussia was then, in 1828, a follower of protective tariff policy. Now

[116] This JOURNAL, *3*:621 (July, 1909).

[117] Glier, *op. cit.*, 81.

the treaty with the United States of 1828 was meant to put the commerce of the two nations "on a basis of absolute freedom," but this surely did not imply free trade. No more did it imply unconditional most-favored-nation treatment. Both countries were followers of the principle of reciprocity. Both were using a protective tariff. From 1828 to 1860 Prussia was numbered among the "vigorous opponents of unconditional most-favored-nation treatment." The reciprocity principle appears clearly in article 9 of the treaty of 1828. Both before and for a long time after, Prussia as well as other German states had distinguished between a restricted and an unrestricted favored-nation clause. The inevitable conclusion is that the Prussian as well as the American negotiators had the conditional rather than the unconditional practice in mind.

Such being the case, articles 5 and 9 should be interpreted together, just as Mr. Livingston's note to Austria in 1832 indicated that they must be for the Austrian treaty. The treaty of 1828, then, calls for *conditional*, not *unconditional*, most-favored-nation treatment. Dr. Glier reasons to this conclusion regarding this treaty, and he holds the same view for the treaty between Argentina and Prussia, of September 19, 1857. In this latter treaty the compensation clause precedes the general article which promises that "no righer or other duties will be levied * * * than on products of any third country" (articles 3 and 4 respectively). Here likewise the two clauses must be read together.[118] He goes even further, and from a careful comparison of the wording and circumstances of several treaties of the United States, Prussia, and Argentina[119] he reaches the conclusion that their most-favored-nation clauses are not unconditional even *pro præterito*.[120] He points out that article 5 of the United States-Prussia treaty of 1828 in reality states merely the negative side of most-favored-nation treatment, it prevents discriminations and assures each state that it will not be put at a disadvantage with others as regards the general tariff. Article 9 states the positive side and

[118] Glier, *op. cit.*, 277–299.

[119] United States–Prussia, 1828; United States–Argentina, 1853; Prussia–Argentina, 1857; United States–Nicauragua, 1867.

[120] Glier, *op. cit.*, 44–49.

guarantees the extension of favors (in return for compensation) which may be subsequently granted to third states.[121]

Although the inference might be drawn from this reduction of Dr. Glier's elaborate presentation that the meaning of the treaty of 1828 could have been arrived at by a comparatively simple study, as a matter of fact from the time when the clause first began to have an importance through the changes which the last two decades have wrought in European tariff policies, these two clauses in that old treaty have been the source of endless disagreement. The Germans have agitated themselves largely over the denial by the United States of their claim for unconditional treatment. The Department of State of the United States, while it has been consistent in maintaining that the Germans have under the treaty no unconditional most-favored-nation rights, has, at the same time, been somewhat inclined to take advantage of the circumstances in which Germany has placed herself through her treaties with neighboring European states to demand "freely," for the commerce of the United States concessions which it is not surprising that the Germans should resist most strenuously. The Germans, on the other hand, have not been unanimous in their conception of the content and obligations of the clause, and have exhibited some inconsistency and lack of co-ordination in the arguments by which they have supported certain contentions.

We have already spoken of the claims presented by Germany after the making of the United States-Hawaiian treaty of 1875,[122] and of how the Germans in making their treaty with Hawaii in 1879 recognized the peculiar relations of Hawaii and the United States as a sufficient ground for making "exceptions" to the rule which they considered laid down in the treaty of 1828. In 1883 the Bundesrat failed to include the United States in a list of eighteen states which were entitled by treaty to tariff reductions. But in 1885, in a list of twenty-four most-favored-nation states which were entitled to the reductions made to Spain the name of the United States was included. No change had occurred in the treaty relations of the two governments in the interval.

[121] Glier, *op. cit.*, 255–262.

[122] See this JOURNAL, *3*:411 (April, 1909).

The action of Germany in making the Saratoga Convention in 1891 clearly indicates that, either the German government did not consider itself bound to accord United States unconditional most-favored-nation treatment, or it knowingly overlooked what the acceptance of that interpretation made its own and the rights of the United States. According to that interpretation each country should have given the other all the concessions which it made to any third. But by the exchange of notes of August 22, 1891, Germany expressly promised to remove certain restrictions upon the importation of American meats, and to give American agricultural products the same treatment accorded to agricultural products of Austria and other countries, while in return, and as a compensation, the United States removed the duty on sugar from Germany. Neither gave the other *freely*, and neither gave the other *all*, the favors given to third parties. Neither was enjoying from the other unconditional most-favored-nation treatment.[123] Staats-Sekretar v. Marschall said in 1897,[124]

> The confederated governments, when they had negotiated the commercial treaty with Austria-Hungary in 1891, did not doubt for a moment that they had the obligation to concede to the United States the same reduction of tariff which they had granted to Austria-Hungary.

The Wilson Tariff Act, in 1894, not only made sugar dutiable, but provided that all sugar from bounty-paying countries pay an additional duty of one-tenth of a cent per pound. The Germans protested against this, as a violation of the most-favored-nation clause, especially since Germany was paying a greater bounty than Austria and France.[125] In 1897 the new tariff contained a provision which remedied this latter difficulty by making the countervailing duty equal the net amount of the bounty. The German government still protested, on the ground that the duty as applied on German sugar violated the treaty of 1828 and "destroyed the premises on which

[123] For an interesting point as to the ideas which the respective governments entertained at that time of their obligations see Fisk: German–American Most Favored Nation Relations, Jour. of Pol. Econ., 11:226, 1903.

[124] In the Reichstag, May 7, 1897.

[125] U. S. For. Rel., 1894, 234–9.

the Saratoga Notes were effected."[126] But the Saratoga Convention had fallen when the tariff of 1894 went into effect.

In 1894 there came up the contention over our salt duties.[127] Mr. Olney, as Attorney-General, said:

* * * The United States concedes "free salt" to any nation which concedes "free salt" to the United States. Germany of course is entitled to that concession upon returning an equivalent.[128]

Two years later, in 1896, Mr. Olney, then Secretary of State, referring back to his opinion in 1894, raised the question of the applicability of the treaty, suggesting that he would be greatly assisted by being "informed of the grounds, if any, for regarding the treaty stipulation [of the treaty of 1828] as now operative with respect to the whole German Empire."[129] No response to this request appears to have been given.

This raises a general question of interpretation which becomes practically applicable at this point: What becomes of the treaty rights and obligations of a state which merges its identity in that of another or with others? Did the treaty of 1828 continue in force? If so, did it apply to the whole German Empire, or to Prussia alone? Without going into the abstract question, there is sufficient ground for supposing that the treaty would continue in force so far as Prussia was concerned, though even that, may, with good precedent, be denied.[130] The position of Prussia in the German Confederation is unique. Also, Prussia was in no sense "absorbed" in the forming of the German Empire. Furthermore its predominance in the empire may readily be used as an argument for the extension of the application of its treaties to the whole empire. But there is no sub-

[126] U. S. For. Rel., 1897, 175–7.

[127] Mentioned *supra*, under *History*, this JOURNAL, *3*:409 (April, 1909).

[128] Moore, *op. cit.*, V: 273–4. By the Act of 1894 salt had been put on the free list, but salt coming from any country which imposed a duty on salt from the United tates was subject to a duty.

[129] Note to *Baron* v. *Thielmann*, February 25, 1896, U. S. For. Rel. 1896, 208–209. Moore, *op. cit.*, V: 353.

[130] See citations given in Moore, *op. cit.*, V: 320–322, 341–356. See Hall, International Law, 5th ed., 351–352. See Glier, *op. cit.*, 303–307.

stantial ground, other than this, for urging that the treaty extended thus.

Supposing that we admit that the treaties of Prussia remained in force. This does not at all imply the admission of their extension to the empire. What evidence have we for deciding this point? It appears that the treaty was at first regarded by both the American and German governments as applicable not only to Prussia but to the entire German Empire.[131] When German-American relations assumed a larger importance the German government continued to emphasize this claim while the United States emphatically denied it. Many of the agreements and obligations of Prussia were extended, first to the North German Bund, and later, with those of the Bund were passed on to the empire. On the other hand there are many cases in which the treaty obligations of the separate German states continued in force but only as obligations of the original contracting state.[132]

Although the treaty of 1828 was not formally recognized as extending to the empire, it was declared in the Reichstag, February 10, 1885, that the United States was entitled to most-favored-nation treatment in Germany. This was repeated in the Bundesrat, January 30, 1892, and again in the Reichstag, May 31, 1897. Count Posadowsky called attention on January 14, 1903, to the position of the government in 1885, quoting this as a recognition of the application of the treaty. These were unilateral declarations as to the force of the treaty. Neither government could of itself declare such extension of treaty obligations. On the side of the United States, Secretary Gresham said, in 1894, " the stipulations [of the treaty of 1828] placed the commercial intercourse of the United States and Prussia, not the entire German Empire on the most-favored-nation basis." Secretary Olney expressed similar views, and Secretary Sherman the same in January, 1898.

Herr Calwer, member of the Reichstag, writing in 1902, took the position that Prussia could not carry on an independent tariff policy, and that this treaty had applied only to Prussia, wherefore it lapsed

[131] Fisk: Jour. Pol. Econ., 11:221, 1903.

[132] See citations in Moore, *op. cit.*, V: 353–355.

of its own accord, making the immediate question whether Germany wished to renew the Prussian treaty and whether the United States would agree to its extension to the empire.[133] Dr. Glier is of the opinion that the treaty never applied to the empire and that the new relation that Prussia assumed and the alteration which was made in the Prussian constitution at the time of the making of the treaty abrogated the treaty altogether.[134] Although it has been repeatedly discussed within the last ten years no official decision of this question has been arrived at.

In 1896, Staats-Sekretar v. Marschall declared that the treaty of 1828 called for *unconditional* most-favored-nation treatment. In 1898, the United States made an arrangement with France by which we granted the French the concessions allowed under section 3 of the Dingley Act. Germany claimed the concessions granted to France. In the Reichstag, on February 11, 1899, Staats-Sekretar v. Buelow declared that the treaty guaranteed *unconditional* most-favored-nation treatment, that article 5 was not limited by article 9, that as article 9 mentioned only commerce and shipping ("Handel und Schiffahrt"), customs duties were not included in it, but in article 5 alone, and that, therefore, the requirement for compensation did not apply to tariff concessions. This was clearly a forced distinction. Article 5 applies to the general tariff and asserts only the negative side of most-favored-nation treatment. The two clauses must be read together. Count Kanitz, referring to our denial of the advantages given France, proposed in the debate, that instead of giving notice of an intention to terminate the treaty of 1828, the Germans give it the American interpretation in applying it to the United States.[135] On the same day Count Posadowsky asserted that Germany was entitled to unconditional most-favored-nation treatment and that the practical question was whether Germany should continue in her understanding of the obligations of the clause or should adopt the interpretation of the United States and decline in future to give the United States the

[133] Calwer: Meistbeguenstigung der Vereinigten-Staaten, 28. See Fisk: Jour. Pol. Econ., 11:235–6, 1903.

[134] See Glier, 303–307.

[135] U. S. For. Rel., 1899, 297. Moore, *op. cit.*, V: 285.

advantages of the Caprivi treaties. Upon being apprised of this, Secretary Hay wrote to our ambassador to Germany, Mr. White:

> While we do not deny the right of Germany to adopt the same construction which controls the action of this government, it should be remembered that whatever construction may be adopted it must be applied uniformly to all governments that are protected by the like treaty clauses. * * * It is evident that Germany can not apply one construction in her relations with this government and another in her relations with an European government.[136]

Our government regretted that the Germans "should refuse to consider article 9 * * * as having any force or effect in connection with article 5." The concessions to France had been dependent upon compensation. "The American government is ready to make the same concessions to Germany for equivalent concessions." If the concessions should be "freely" granted to Germany, the United States would have to grant the same gratuituously to all other nations.

The matter was temporarily settled by the German-American reciprocity agreement, of July 10, 1900. By this the American government obtained all the tariff advantages which European countries were enjoying under the Caprivi treaties. The United States did not accord Germany absolute most-favored-nation treatment but made certain concessions authorized in the Dingley Tariff Act. Certainly in this transaction neither government was negotiating upon the basis of an unconditional most-favored-nation obligation. This agreement was to regulate German-American commercial relations until 1903, after which Count Posadowsky claimed they would rest again on the treaty of 1828.

In the interval the Germans were making a scientific study of various tariff questions, and the government began to revise its views on the subject of its most-favored-nation obligations. Herr Calwer pointed out that the treaty of 1828 was inoperative. Dr. Paasche said, December 13, 1902, in the Reichstag:

> We have absolutely no occasion to concede anything to such nations as are glad to take what we give other countries without making us any concessions in return. The United States has introduced the limitation

[136] Hay to White, April 8, 1899. U. S. For. Rel., 1899, 301. Moore, *op. cit.*, V: 387–388.

of the most-favored-nation clause; we have every reason to act in precisely the same manner.[137]

On the 15th of January, 1903, Count Posadowsky declared "the United States no longer enjoy most-favored-nation treatment in Germany."[138] By this he meant that the United States were no longer recognized as having a right to demand unconditional most-favored-nation treatment. This amounted to a recognition of the reciprocal nature of the treaty of 1828. Count Posadowsky said that he himself had previously been mistaken in believing that concessions made to other countries in new European treaties would have to be given to United States ("ohne weiteres").[139] He also stated the necessity for revising our treaty relations and for arriving at a common basis for dealings and interpretation. In February, 1905, appeared Dr. Glier's book. In his effort to discover the real meaning of the German treaties, and to formulate a policy for German most-favored-nation practice in future, he arrived, after having studied more than 500 treaties, at such conclusions as follows: That the interpretation given the treaty of 1828 by the German government was entirely wrong; that Germany had no right to demand unconditional most-favored-nation treatment of the United States; and that the Americans have loyally fulfilled their treaty obligations.[140] He concludes also that Germany had likewise only a *conditional* most-favored-nation treaty with Argentina and had therefore neither the right to demand, nor the obligation to give, concessions from and to Argentina except on a basis of reciprocity.[141]

[137] Quoted by Prof. Fisk, Jour. of Pol. Econ., 11:236, 1903.

[138] "Die Vereinigten-Staaten sind nicht mehr meistbeguenstigt in Deutschland."

[139] "Das wurde der Fall sein, wenn wir mit der Vereinigten-Staaten ein allgemeines Meistbeguenstigungsverhaeltnis haetten. Das ist aber nicht der Fall. * * * Davon kann also gar keine Rede sein, dasz den Vereinigten-Staaten von Amerika ipso facto eines Vertragsabschlusses mit anderen Staaten neue Konzessionen zufallen koennten." Quoted in Glier, 267. See also Glier, 310.

[140] "* * * die Ueberraschung der Reichsregierung * * * voellig unbegruendt war." Glier, *op. cit.*, 81. "Wir hatten keinen glatten Meistbeguenstigungsanspruch gegen sie," 273. "* * * die Amerikaner ihren Vertragspflichten loyal und gewissenhaft nach zu kommen bestrebt sind," 274–275.

[141] *Passim*, but especially pp. 6, 8, 9, 61–62, 277. The Argentina–Prussian treaty of 1857 has never been abrogated, but the same arguments apply as to its being or not being in force which have been cited for the United States–Prussian treaty.

At a meeting of the German Landwirtschaftsrat on February 9, 1904, Count Schwerin-Loewitz said that the Frankfort treaty of 1871 made it necessary that Germany give the United States all the concessions which Germany made to France gratuitously. The Frankfort treaty had placed German-French commerce upon a basis of permanent unconditional most-favored-nation treatment. Herr Calwe said, in 1902,

> We must grant to France gratuitously every concession made to England, Belgium, Holland, Switzerland, Austria, and Prussia. * * * There follows indirectly for this affirmation of the principle of reciprocity (on the basis of article 9 of the Prussian-American treaty) the legal claim of the United States to unrestricted most-favored-nation rights. Since all advantages accrue to France without reciprocal compensation, such compensation can no longer be demanded of the United States.

In other words, says Professor Fisk, Germany has placed herself in the position of being morally obligated to give the United States *un*restricted most-favored-nation privileges while she can only claim restricted privileges in return.[142] Dr. Glier strenuously objects to this view of the obligations of Germany under article 9 in the treaty of 1828, in connection with her obligations to France under the treaty of 1871. His contention is that the favors granted by Germany to France are not gratuitous, but in return for compensation. This, because France treats most German imports on a better footing than the same goods imported from the United States. It it can be shown that France makes Germany concession for concession, the soundness of Dr. Glier's position cannot be questioned. But the evidence presented is not conclusive. The all-comprehending form of article 11 of the Frankfort treaty, implying that the advantages now extended and to be extended by each of the contracting parties shall be considered as equivalents for all advantages extended and to be extended to it by the other, is the most explicit provision for the "free" granting of future favors which can be imagined, and this "blanket" compensation scarcely meets the principle of special compensation. But even were Dr. Glier's point established as regards Franco-German relations, so long as Germany grants other nations

[142] Fisk: Jour. Pol. Econ., 11:222, 1903.

having most-favored-nation rights "freely," the concessions which she grants France, there can be no question of denying the same advantages without compensation to the United States. The only real escape from that obligation — and the sound one — is to assert that the treaty of 1828 is no longer applicable.

In 1903, December 17, the United States-Cuban reciprocity treaty was proclaimed. By this treaty all articles of Cuba which are not admitted free into the United States are given 20% reduction on the general duty, and articles of the United States enjoy from 20% to 40% reduction from the general tariff on entering Cuba. Article 7 lays down that neither country will grant to a third the advantages granted to the other. The rates granted by each to other shall continue during the term of the treaty "preferential in respect to all like imports from other countries." The United States will admit "no sugar the product of any foreign country, * * * at a lower rate than that provided by the tariff act [of 1897]." This establishes a very real differential, and would at first seem directly contrary to the practice of the United States, which is that every country shall be given the opportunity to obtain advantages conceded to a third by offering compensation. This provision discriminates especially against German sugar. The Germans have pointed out that, even though the relations of Cuba and the United States are unusually close, yet Cuba is a sovereign state and the United States bargains with her as such. According to the German view, so long as Germany and the United States have most-favored-nation relations, the United States must give Germany the opportunity to offer a concession for which she may secure the advantage granted to Cuba. Whether or not one will grant this depends on the view taken of the relations of Cuba and the United States. There is such similarity between this case and the Hawaiian case wherein in 1878 Germany admitted that "extraordinary circumstances" made the preferential between Hawaii and the United States warrantable. South American treaties now expressly exclude favors granted South and Central American States from the operation of the most-favored-nation clause. Portugese treaties expressly exclude favors granted Spain and Brazil. Sweden, Norway, and Denmark exclude favors granted each other.

Colony-holding countries expressly or impliedly exclude the reciprocal relations of the mother country and the colonies. Japan excludes favors granted to Corea and lands east of the Straits of Malacca. Why should not the relations of the United States and Cuba be excepted from the operation of the most-favored-nation clause? The denial of this right can only be made by placing emphasis upon the necessity for *express* exception.

In the new series of German tariff-treaties, whenever rates differing from those already in effect were established with a given country, those rates were extended automatically to all other countries with which Germany had most-favored-nation relations. The German Embassy notified the United States government that the arrangement of 1900 would be terminated in time to apply to the United States the new general rates which were to go into effect March 1, 1906. Toward the end of 1905 they presented certain demands by meeting which the United States could secure the transitory extension to her commerce of the lower rates. These demands included especially a number of changes in our methods of customs administration. This was met by the issuing of a se..es of orders to our consular agents and customs officers and a proclamation by the President renewing reductions of duties, specified in the Dingley Act. The German government considered these concessions sufficient to warrant the extension to the United States of the rates established in the seven new treaties. This arrangement was to continue in force until June 30, 1907. In the summer of 1906, Germany made further treaties with Sweden and Bulgaria, and refused to extend the additional conventional rates to United States, although they extended automatically to the parties to the seven treaties. Plainly, Germany did not consider any unconditional most-favored-nation obligation to exist between herself and the United States, and plainly the United States are liable to be discriminated against at any time.

At this point the United States Tariff Commission of 1906 was appointed. After several months of work in Germany with the experts whom the German government had appointed the commission made a partial report, February, 1907, proposing: (1) the continuance of the *modus vivendi* for one year; (2) the adoption of a reciprocity

treaty with Germany, including the concession of certain rates of duty on each side. A commercial agreement was signed May 2, 1907, which went into effect July 1, 1907. Under this agreement about 97% of the imports of the United States are subjected in Germany to the conventional tariff, that is, receive the reduced rates made to countries having most-favored-nation relations with Germany. In return the United States government made changes in the customs and consular regulations along the lines requested by Germany. This convention was to continue in force until July 30, 1908, and afterwards, subject to six months notice for termination. This agreement then is the basis upon which commerce of the United States with Germany is now regulated.[143]

The treaty of 1828 has not been formally abrogated by either government, nor have the questions whether it extends to the whole empire or only to Prussia, or whether it calls for unconditional or conditional most-favored-nation treatment been decided. But so far as its most-favored-nation clauses are concerned, it is absolutely a dead letter. Neither in theory nor in practice have its terms applied to German-American relations in recent years — we may almost say, since 1891. As a matter of fact this treaty has been omitted from the list published by the British government in 1908 of "Commercial Treaties in Force." The present arrangement is satisfactory neither to Germany nor to the United States. It is imperative that we come to an agreement concerning a new and a sound commercial policy, and one of the first problems to be solved in the effort to reach an agreement is a common basis for most-favored-nation treatment.[144]

The objections to the clause fall into three classes: (1) those which find fault with its operation in general; (2) those which condemn the strict interpretation; and (3) those which are urged against the limited interpretation.

[143] On the subject of our recent commercial relations with Germany, see 60th Cong., 1st Sess., Sen. Doc. 185; Weltwirtschaft, 1907, I, p. 16, and 1908, I, p. 8; U. S. Tar. Series, No. 7, 1908; Willis, H. P.; Reciprocity with Germany, Jour. Pol. Econ., 15:321–344, 385–398, 1907. [Since Mr. Hornbeck wrote this article the United States has denounced its commercial agreements with foreign nations in view of the new tariff law. — Ed.]

[144] See Willis: Jour. Pol. Econ., 15:388 ff, 1907.

Among the general objections, the most prevalent is that the clause becomes a hindrance to the freedom of action of a nation. This is the sentiment which has led some nations to attempt to abolish their most-favored-nation treaties — and it is readily seen that this idea is entertained in conjunction with a policy of strict interpretation. At the same time, the *uncertainty* and *vagueness* which attach to the clause have given rise to widely divergent views as to its value and no little misapprehension of its advantages and disadvantages. The fact that the third nation sometimes gets at almost no cost a greater privilege than a second has purchased at what to it is a great price, and that a nation can not be sure when it makes such a treaty how future circumstances may affect its value or how a co-contractant may eventually interpret it, suggests an insecurity which results in some cases in a decided aversion to the use of the clause.[145]

M. de Martens considers it wrong to expect the strict interpretation of the clause to apply at all times. We should distinguish between a commercial advantage pure and simple, and an exchange of advantages. In the latter case, for the second nation to demand the favor granted the third nation, would work a hardship to the first, and this would be contrary to the principle of reciprocity contained in the treaty.[146] Lehr, however, doubts whether this distinction will be recognized by a nation which has made an unqualified most-favored-nation treaty.[147] Von Melle, while he seems to insist upon the principle of strict interpretation, recognizes that even under the best conditions, its general application may result in injustice.[148] He gives the example suggested by Schraut,[149] and since quoted by almost every writer on the subject: A certain state may have concluded a treaty with another not to levy a duty upon the wines of

[145] *Cf.* Cavaretta, *op. cit.*, 159.

[146] De Martens, Droit international, Tome II: 322; Calvo: Droit international, VI: 287.

[147] Lehr, *op. cit.*, 315.

[148] "Andrerseits laesst sich freilich nicht verkennen, dass durch die stricte Interpretation der unbeschraenkten Meistbeguenstigungsclausel in einzelnen Faellen sehr harte Consequenzen fuer den Verpflichteten entstehen koennen." (Von Melle, *op cit.*, 206.)

[149] Schraut, *op. cit.*, 43.

the latter according to the percentage of alcohol, so long as that state does not levy similar duties upon the wines of the former. Yet a third state, though charging duties on wines according to the percentage of alcohol, might demand in virtue of the most-favored-nation clause this more advantageous treatment for its wines. This would evidently be unjust to the first nation. It does not, however, he adds, imply the falsity of the general principle,[150] and he would apparently put nations on their honor not to take advantage of one another.[151]

A strong objection to the clause is based upon the fact that in general the obtaining of any favor — this is the view of those who look to the clause for positive advantages — depends upon a treaty subsequently made by the co-contractant with a third state, which leaves the treaty in this respect incomplete and the advantages to be derived from it a very uncertain quantity. For instance, Staats-Sekretar v. Marschall suggested that the clause acquires no value in any given treaty until further treaties are made with other states. It thus acquires its real import not from the will of the parties to the original treaty but through the "treaty-will" of other states.[152] This, Dr. Glier regards as strongest among the arguments against unconditional favored-nation practice.[153] A further complaint made against the operation of the clause in some cases is, that it occasions a loss of revenue.

These objections have furnished the field for much argumentative attack and the starting point for several not very effective crusades against most-favored-nation treaties. We have already mentioned certain opposition to the clause on the part of Spain, Portugal, France, and South American countries.[154] Dr. Costa, of Argentina, has

[150] Von Melle, *op. cit.*, 206.

[151] "Uebrigens duerfte von der Loyalitaet der contrahierden Staaten die Abstandnahme von einer derartigen unbilligen Ausnutzung der Meistbeguenstigungsclausel zu erhoffen sein." (Von Melle, *op. cit.*, 206.)

[152] "Der Inhalt der Meistbeguenstigungsvertraege bestimmt sich nicht durch meinen Vertragswillen, sondern durch den Vertragswillen anderer Staaten." In the Reichstag, January 22, 1892.

[153] "Diese Erklarungen bilden u. E. das staerkste Argument gegen die unbedingte Meistbeguenstigung." Glier, 353–354.

[154] This JOURNAL, pp. 401–402 (April, 1909).

ırgued that the Argentinians can not gain sufficient from such treaties to compensate them for what they concede, because so few Argentinians reside in Europe while Argentina has a relatively immense foreign population. Sr. Gueselaga, in his "Estudio de los tratados de comercio de la Republica Argentina," urged the denunciation of all the Argentinian treaties in order to eliminate the most-favored-nation clause entirely.[155] Dr. Costa's argument applies to the incidental advantages such as treatment of subjects, rather than to those extended to commerce and navigation directly. In France, in 1889, the extreme protectionists desired to exclude the clause from all future treaties, on the ground that, although France had less to fear in given lines of production from one country than from another, yet the advantages given one had to be given to the other.[156] Still another argument for doing away with the clause is that its use makes a concession offered in negotiation with a third party less valuable to that party because it is known that the concession must be or may be given to another or other nations.

On the other hand, the majority opinion champions, and the general practice favors, the retention of the clause. Commercial treaties, suggests Von Melle (*op. cit.*, 210), may be divided, as regards their tariff provisions, into three classes: first, those containing only *special tariff agreements;* second, those which in addition, have the *most-favored-nation clause;* third, those which have *no special tariff agreements,* but *only the most-favored-nation clause.* In the first, the parties agree to charge no higher tariff than that specified in the schedule. This restricts each in its freedom of action, but only as against the co-contractant and not as against a third nation. If, now, a most-favored-nation clause be used without the tariff provision, an increase in the tariff is allowed, but the treatment of the co-contractant must not be less favored than that of any other nation. A state bound by such a treaty can neither raise its tariff nor take it off for the benefit of a second state. This constitutes a limitation, and may be inconvenient, but, as the reciprocal principle holds, the advantages in general may outweigh the inconven-

[155] Quoted in Argentina: Doc. Dip. y Consulares, Bol. No. 17, 1903, p. 9.
[156] See Meredith: Protection in France, 20–22.

ience.[157] A state gains, as compensation, a firm tariff basis, an assurance that alterations will take place only in the direction of lowering, and that the competition of any other state, through special advantages which might be given it by a higher tariff, is not to be feared.[158] This security, which can best be obtained through the most-favored-nation clause, constitutes a very great advantage in international trade, and is so important that the limitation of freedom and loss of customs duties must be made a minor consideration.[159] At once rigid and elastic, by its rigidity insuring against surprises and by its elasticity easing the shock of sudden changes in commercial policy, the clause performs an invaluable function in international trade. Its important influence in the overthrow of the individualistic and dualistic commercial policies which formerly hindered world commerce has already been emphasized. Its all-important function in automatically establishing the conventional schedule in the "general and conventional" tariff system, and in preventing the inevitable confusion which would arise from the extensive use of tariff-treaties in its absence is too well recognized to need emphasis.

Logically, the universal acceptance of that form and interpretation of the clause which would satisfy the "unconditional" school would eventually lead, whether that be its object or not, to absolute free-trade. To the defenders of the limited interpretation, who argue that to extend gratuitously to one nation that which has been purchased by a third is unfair to the latter, the adherents of the opposite interpretation answer that this would be true if the discrimination were against one nation only, but that if the rule be applied to all, all will be equally benefited, and there will therefore be no discrimination, and, further, that the benefits of such an application work both ways. This is simply another way of saying — all unconsciously, perhaps, — that the universal use of the clause, in its unqualified form, with strict interpretation, would abolish all protective systems,

[157] *Cf.* Fontana-Russo: Trattato di Politica-Commerciale, p. 606.
[158] *Cf.* Yves Guyot: La Comédie Protectioniste, 32.
[159] Von Melle, *op. cit.*, 210.

and, as we have remarked, result in free trade.[160] Some even go so far as to argue that under the other interpretation the clause has no value since it offers no constant or certain guarantee. This argument — all else aside — overlooks entirely the chief function of the clause, which is to prevent discrimination. On the other hand, under the Utopian system to which universal unconditional usage would lead, that of free trade, the clause would have no value as it would be absolutely redundant.

The explanation of the disagreement is to be found in the conflict of commercial policies. In viewing the politics of modern commerce we have to take into consideration that there are no less than five tariff systems in operation. First comes the English system of approximate, though not absolute, free-trade.[161] A country following such a system can make unqualified most-favored-nation treaties with a consciousness that it has everything to gain and practically nothing to lose. At the opposite extreme come countries such as the United States, with a general tariff at the same time highly protective and involving a single schedule of duties. A general acceptance of the unconditional usage would make it necessary for countries which have and wish to retain this system either to omit the clause entirely from their treaties, or, to limit the number of treaties containing it to a small circle of nations and refrain absolutely from granting concessions to other nations. No nation in the position of the United States, and with a high-protective, single-schedule tariff, could, with due regard to economic circumstances, give most-favored-nation concessions under other than the United States interpretation, nor has the United States ever meant to do so.[162]

[160] "'By the self-registering action of the most-favored-nation clause, common to this network of treaties, the tariff level of the whole body is continually lowered, and the road being paved towards the final embodyment of the Free Trade principle in the international engagement to abolish all duties other than those levied for revenue purposes.'" (Morley, Life of Cobden, II: 342.)

[161] Great Britain has a list of twenty dutiable articles, the duties being levied for revenue or sumptuary purposes only.

[162] "It would require the clearest language to justify the conclusion that the United States government intended to preclude itself from * * * engagements with other countries which might in future be of the highest importance to its interests." (Whitney *v.* Robertson, 124 U. S. 190.) *Cf.* Barclay, *op. cit.*, 140. *Cf. supra*, p. 412 (this JOURNAL for April, 1909).

Between the two extremes come the three systems which have developed practically within the past twenty-five years, the "maximum-and-minimum," the "preferential," and the "general-and-conventional" tariffs. In the operation of the maximum-and-minimum system, as exemplified in France, commerce with any given country is less dependent upon treaties than under systems where legislative control is more indirect. It is true that, even here, unconditional most-favored-nation treatment means the admission of all who enjoy the right, to participation in privileges extended to *whatsoever* nation, but there is a common stopping point, the minimum rate, for concessions. Since, however, as has happened in their dealings with Switzerland, Italy, and Russia, the French may be forced to grant concessions *below* the minimum, the operation of this system is not unqualifiedly successful and most-favored-nation treatment under it is not without embarrassment.[163]

The new systems of preferential tariffs which are being developed by the British colonies in South Africa, Australia and Canada violate the strict principle of unconditional most-favored-nation treatment. The South African colonies and Australia have two-column tariffs, giving a preferential to the mother country and reciprocating British colonies by means of a surtax on the products of other countries. Canada has adopted a three-column tariff, with a general rate, a preferential rate for England and the colonies, and an intermediate rate to be extended to countries which make satisfactory concessions in return. Although in theory the inter-relations of mother countries and their colonies are to be excepted from the operation of the clause, yet that theory contemplates *dependent* colonies. The autonomous position of these larger British colonies is such that their commercial dealings and the establishment of their tariff policies approximate those of sovereign and independent countries. Logically, and in practice, their preferential is inconsistent with the idea of unconditional favored-nation treatment.

The general-and-conventional tariff system, of which Germany is the foremost exponent, really owes its success to the most-favored-nation clause. It is only by the operation of the clause that the

[163] See Fisk: International Commercial Policies, 95.

conventional rate is established, and it is only because each nation knows that it is guaranteed by the clause against subsequent discrimination that it is possible to negotiate successfully the treaties which are a necessary part of the system. In this system, a protective tariff and unconditional most-favored-nation treatment can be harmonized. Yet, even here, the knowledge that the clause generalizes concessions exercises a decidedly restraining influence in negotiations. The government must, in each case, weigh not alone the advantages to be gained in a contemplated treaty, but the effect which the concessions will have on its commercial intercourse with all the other countries to which it owes most-favored-nation treatment. It can not afford, for instance, to grant a large concession to a country with which it has a comparatively slight volume of trade, even though it gain a very real advantage from the return concession, because its own concession must at once be generalized. Thus it hinders as well as helps even in this system. The striking success of the general-and-conventional system must however be recognized. Next to the free-trade system, it is best adapted to unconditional most-favored-nation practice.

Apropos of the interpretation made by the United States of the reciprocity treaty with Hawaii, 1875, M. Visser suggests that the "impossibility" for other nations to fulfil the conditions necessary to entitle them to enjoy privileges similar to those enjoyed by the United States was an "impossibility" announced by the United States because of the fact that under any other interpretation the treaty would have no value for the United States. The observation fails to carry its intended argumentative weight against the American contention — as there was a *very real impossibility*, and as the circumstances were unusual[164] — but, in its very directness, it furnishes an excellent justification of the American interpretation. Not that a country should interpret every treaty to its own advantage, and overreachingly, but because every reciprocity treaty is framed with the idea of securing mutual advantages, and commercial policies are dictated by motives of economic and political self-interest. To give to such a treaty an interpretation by which it

[164] *Cf.* Herod, *op. cit.*, 116.

would have no value for one of the contracting parties would be directly contrary to its character and to the spirit in which it was made.

Each nation expects when making, and therefore when interpreting, its treaties, that they shall conform to the general scheme of its commercial policy and operate to its commercial advantage.[165] To these circumstances we must look for an explanation of the differences in present practice, while to the fact that the historical background has been lost sight of we owe most of the disagreement over the interpretation of old treaties. European countries, having adopted commercial policies and a form of the clause different from those which they used at one time, now wish to make the interpretation of all the treaties, both new and old, conform to their present policy. Where view-points differ it is very natural that two parties fail to read the same meaning from the words of a clause, where a slight difference in emphasis makes a great difference to their commercial interests. The content of such terms as "favor," "protection" and "reciprocity" assume a very different meaning in the mind of a protectionist nation which must weigh concession against concession, from that which they are given in the vocabulary of a free-trade nation.[166]

Can a common ground be reached? Certainly this should be possible as far as regards the interpretation of old treaties. As for treaties made since 1860, it would appear fair that the distinction between those clauses which contain the stipulation for compensation and those which do not, be recognized, and that the former be interpreted as conditional and the latter as unconditional. At the same time the acceptance of this rule, aid though it would, would by no

[165] *Cf.* Livingston to Lederer, November 5, 1832. Moore, *op. cit.*, V: 251.

[166] "What we [English] forget is, that, in its commercial policy, every other Nation has to think of its tariff relations with the whole world — of which we are not always the largest part. And what we should remember is that it would be a very serious thing for a protected country to give us advantages that it might otherwise be inclined to give us, when, under its Most-Favored-Nation Clause, it would have to give the same advantages to other nations." (Smart: The Return to Protection, 137.) *Cf.* Poinsard: Droit International, 325; and Grunzel: System der Handelspolitik, 462–463.

means rid us of the confusion which must exist as long as both systems continue in vogue.

One of the first impulses among those European nations which in recent years have felt themselves suffering on account of the interpretation placed upon the clause by the United States, was to accept the American interpretation in their dealings with the United States, while retaining the European usage in their dealings with their nearer neighbors. This, however, was impossible, for if they first use the European interpretation in dealing with European states, then follow the American interpretation in dealing with the United States, they have to give the latter all the advantages which they give "freely" to other Europeans, and therefore their neither save themselves, nor do they retaliate on the United States. To illustrate: the German treaties concluded between 1903 and 1906 with the central European states were based on reciprocity, with mutual concessions, but later Germany, in fulfilling her favored-nation obligations, extended the conventional rates made up from these concessions, to Great Britain, France, and other states "freely." If, then, the Prussian-United States treaty of 1828 had been considered as having full force, Germany would have had to extend all of the same advantages to the United States (freely).[167]

To arrive at a universal system, either European countries must return to that usage which they once practised in common with the United States, or the United States must give up the system to which she has uniformly held. Neither change could well be effected without changes in commercial policy. There has been some tendency among European economic writers to favor the American most-favored-nation practice as the more expedient and better fitted in the long run to protect commercial interests. If Great Britain swings strongly toward protection and if the preferential system develops more extensively, there will be good reason for the English to consider a departure from the use of the unconditional clause. The adoption of the conditional form by the continental nations would somewhat lessen the facility with which tariff-treaty negotiations may be carried on, but it would at the same time free the negotiators from

[167] *Cf.* Stone: N. Am. Rev., 182:445, 1906. *Cf. supra.*

a number of cramping restrictions. There is, however, no likelihood of such a change being soon consummated. It would be impossible for a decade, since European tariff-relations are settled for that period by the new treaties, most of which run till 1915 or 1917.

For the United States to change would require a radical departure from present commercial policy. Such a change has been made the subject of much discussion. The necessity for a commission to give our tariff policy a scientific and searching consideration as has been done in Germany and France, and as is being done in England, has been urged — and with reason. The possibilities of the conventional and of the maximum-and-minimum systems have been repeatedly canvassed. It is agreed that the machinery of our government makes the conventional system impracticable, in fact impossible. It has been pointed out by some writers that, under it every reciprocity treaty would have to be approved not only by the Senate but by the House, since each would contain new tariff rates which, under the Constitution, only the lower house can initiate. The negotiation of a series of treaties would take a long time, and the making of a conventional tariff at the hands of successive Congresses would be very difficult.[168] The alternative would be the maximum-and-minimum system. In this, the minimum rate could be made uniform by act of Congress and the Department of State would be free to make treaties on a reciprocity basis for rates between the minimum and the maximum. To this, Senator Beveridge argues that we must come. Mr. William R. Corwine urges that we should "join the procession of modern nations which have, one after another, discarded the single tariff and adopted one form or another of the maximum and minimum," but he also advocates the elimination of treaties altogether, and that the President be authorized to make commercial agreements within the limits imposed between the maximum and minimum.[169] Professor Willis suggests that the adoption of the unconditional most-favored-nation usage along with tariff treaties would lead to progressive tariff reductions, and that it would

[168] See Stone: Annals American Academy, 32:379-380, 1908. See Senator Beveridge, *ib.*, 409 ff.

[169] See Annals American Academy, 32:313–312, 1908.

be difficult indeed to get treaties having such an effect through Congress. The maximum-and-minimum plan would, in his opinion, be clumsy if the minimum duties represent a horizontal reduction from the maximum. To obviate these difficulties he suggests a modification of the latter system; that Congress expand the list of articles contained in section 3 of the Dingley Act and leave to the President the making of reciprocity bargains. Such a system would, he believes, operate with less difficulties than others, and would admit of the adoption by the United States of the European favored-nation practice, thereby leading us to the elimination of many difficulties.[170]

Since it is a fact that commercial policies differ, and since it is known to every diplomat that treaties have been made and are being made under different circumstances and with differing wording, old misunderstandings ought to be cleared up, and mutual recriminations should cease. The attitudes of the leading representatives of the opposing interpretations have been repeatedly stated and regularly maintained. The tariff policies and the motives of each are well known to the others. The treaty-making authorities of each of the great nations have little excuse for entering into future most-favored-nation treaties with others and subsequently claiming that the interpretation put upon the favoring clause by those others is unfair — as each may see in advance what the interpretation is to be. A general agreement should be reached as to the interpretation of each form of the clause, and, if possible a common form should be devised whose meaning will be unequivocal, which can be accepted or rejected upon an absolute basis of interpretation. Von Steck and Von Melle recognized, long since, the necessity for definite and unequivocal

[170] Willis: Reciprocity with Germany. Journal of Pol. Econ., 15:385–398, 1907. "Back of this [the problem of tariff policy] is the question to be determined by the State Department with regard to the future interpretation of the most-favored-nation clause. The adoption of the European interpretation of that clause will bring our commercial diplomacy into line with that of other nations, and will do away with serious danger of friction in the future. Could the adoption of the European interpretation * * * be coupled with such a policy of tariff revision as has been suggested, the commercial difficulties which now threaten, not only from the side of Germany, but in other quarters as well, would be definitely removed." (*Ib.*, 394–395.)

stipulations.[171] De Martens and Lehr have advocated a more exact definition, for instance a provision that "the contracting parties shall concede to one another all the advantages relative to commerce and navigation accorded by them *gratuitously* to any other power whatsoever," advantages accorded by exchange or for compensation to be entirely excluded from this class.[172] This suggested form accords almost exactly with the interpretation of the United States. The possible objection to it lies in the comprehensiveness of "any other power whatsoever." Count Posadowsky has said that in future treaty-making it will be necessary to individualize the question of most-favored-nation treatment more specifically, and to examine cases individually.[173] Dr. Chester Lloyd Jones strongly urges the advantages which attach to the American usage.

> As applied both to treaty-making and legislation in general the interpretation of the most-favored-nation clause adopted by the United States has the decided advantages of flexibility and certainty. It allows the adjustment of relations to varying conditions and thus avoids the adoption of uniform rules which in many cases would in fact amount to discrimination. It also avoids the uncertainty on the part of the legislatures and the courts which must of necessity be present when, due to the interlocking of the provisions of various treaties it is not clear to which body of facts any law or treaty may apply.[174]

Sig. Cavaretta believes that whatever reform is made should be on a basis of reciprocity and that treaties should be concluded for a definite period of time.[175] Reciprocity is certainly, although it may not be admitted in individual instances, the principle aimed at in the commercial policies of modern nations.

[171] *Cf.* Von Melle, *op. cit.*, p. 207.

[172] "* * * nous pensons d'accord avec notre éminent collègue qu'il est essentiel de remplacer cette clause dans les traités à conclure par une définition plus exacte, par exemple, par une disposition portant que 'les parties contractantes se concèdent mutuellement tous les avantages relatifs au commerce et à la navigation, accordés par elles gratuitement à n'importe quelle autre puissance.' Quant aux avantages accordés moyennant échange ou compensation, il nous paraît qu'ils devraient toujours être exclus de la clause." (Lehr, *op. cit.*, 315–316.)

[173] In the Reichstag, January 15, 1903. Quoted in Glier, p. 323.

[174] Lloyd Jones: The American Interpretation of the most-favored-nation clause. Annals American Academy, 32:393, 1908.

[175] Cavaretta, *op. cit.*, 167–168, and note 2.

Whether accepting, as many do, or not, the idea of framing a clause which will embody the principles involved in the "compensation" form, all who discuss the clause agree that care should be taken in making future treaties, and that the interests of commerce and international good-fellowship demand that nations come to an agreement as to means and methods for avoiding misinterpretation. In 1902, the Dairy Congress in Belgium adopted a resolution favoring either the abolition of the clause, or the insertion of a provision restricting it and specifying that its operation should not extend to reductions of duties or the liberty of trade which had been conceded to other nations on a basis of reciprocity.[176] As a result of discussion at the Pan-American Scientific Congress, at Santiago, Chile, December 25, 1908, to January 5, 1909, the Congress voted:

> The Pan-American Scientific Congress, in view of the difficulties which have been caused by the interpretation of the most-favored-nation clause, recommends that the bearing of the clause should be defined in each treaty in which it is stipulated. When the most-favored-nation clause is granted, the respective governments should remain free to make special concessions to neighboring countries.[177]

Sir Thomas Barclay suggested in a paper read at the Conference of the International Law Association at Portland, Maine, August 3, 1907, this resolution:

> Whereas any varying interpretation of the most-favored-nation clause gives rise to instability * * * it is suggested that any state holding itself to be aggrieved by any such varying interpretation should be entitled to cite the co-contracting party before the Hague Court, and that the jurisdiction of the said Hague Court in all such matters should be accepted without reservation.[178]

[176] Argentina: Doc. Dip. y Consulares. Bol. No. 17, pp. 17–18, 1903.

[177] Senor Ernesto Frias, of Uruguay, read a paper in which he favored the abandonment of the most-favored-nation clause for a system of maximum, minimum, and special tariffs. Senor Julio Philippi, of Chile, argued that the most-favored-nation clause need not be considered incompatible with other systems of tariff policy, and urged that much of the inconvenience which attaches to the use of the clause on account of the uncertainty as to its interpretation could be avoided if nations would stipulate in the treaties in which they insert the clause just what interpretation is to be given it.

[178] See Yale Law Journal, 1907, p. 32.

A hopeful sign appears in the arbitration provisions which are being incorporated in increasing number in the texts of commercial treaties. For instance, the protocol following the treaty between Great Britain and Italy of June 15, 1883, declared that:

> Any controversies which may arise respecting the interpretation or execution of the present treaty, or the consequences of any violation thereof shall be submitted, when the means of settling them by amicable agreement are exhausted, to the decision of the commissioners of arbitration, and the result of such arbitration shall be binding upon both governments.[179]

The new German treaties, with the exception of that with Russia, provide for arbitration of difficulties over the interpretation or application of the tariff or of most-favored-nation treatment. Most of the others of the recent group of central European treaties contain similar provisions.[180]

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[179] The next paragraph prescribed for the selection of the commission.

[180] See Treaty between Austria-Hungary and Germany, January 25, 1905. The treaty between Great Britain and Bulgaria, November 26, 1907, provides, article 18, that "any controversies * * * regarding the interpretation or application of the tariffs annexed * * * including the additional stipulations * * * as well as the rates of the Convention tariffs agreed upon between the contracting parties and third states, shall, on the demand of one or other * * * be adjusted by means of arbitration." The treaty between Great Britain and Servia, March 31, 1908, article 14, contains similar provisions.

THE INTERNATIONAL OPIUM COMMISSION

Part 2

GOVERNMENT ACTION SINCE THE PUBLICATION OF THE PHILIPPINES REPORT

Following the issue of the Philippines Report, and as the diplomatic correspondence proceeded, which led to the International Commission, action after action was taken by the interested governments to control or stamp out the misuse of opium. The Chinese government was prompt, and her leaders and people enthusiastic. January, 1906, saw four of her great viceroys publish a manifesto on the subject. Part of it ran: "As Great Britain is the friend of China, she will shortly be called to assist the Chinese government to stamp out the evil." The Chinese government prohibited, without qualification, the use of opium in the Imperial colleges and schools, and in the recently created army. The *Peking Gazette,* of September 20, 1906, published the following decree:

Imperial Decree

Since the restrictions against the use of opium were removed, the poison of this drug has practically permeated the whole of China. The opium smoker wastes time and neglects work, ruins his health, and impoverishes his family, and the poverty and weakness which for the past few decades have been daily increasing amongst us are undoubtedly attributable to this cause. To speak of this arouses our indignation, and, at a moment when we are striving to strengthen the Empire, it behooves us to admonish the people, that all may realize the necessity of freeing themselves from these coils, and thus pass from sickness into health.

It is hereby commanded that within a period of ten years the evils arising from foreign and native opium be equally and completely eradicated. Let the Government Council (Cheng Wu Ch'u) frame such measures as may be suitable and necessary for strictly forbidding the consumption of the drug and the cultivation of the poppy, and let them submit their proposals for our approval.

Late in November eleven articles were made public for the enforcement of the above Edict. They are as follows:

ARTICLE 1. — *To restrict the cultivation of the poppy in order to remove the root of the evil.*

The effects of poppy cultivation on the agricultural interests of the country have been disastrous. Throughout China the chief sources of opium production are the provinces of Szechuan, Shensi and Kansu, Yünnan and Kueichou, Shansi, Kiangsu, and Anhui, but in the remaining provinces it may be said generally that there is hardly a place from which it is absent. The term of ten years has now been fixed for the complete prohibition of its use. It is therefore necessary first to limit its cultivation, in order that the complete prohibition of its consumption may be successfully carried out; and with this end in view, all governors-general and governors of provinces should direct the departmental and district magistrates to make an accurate investigation of the acreage in their respective jurisdictions hitherto devoted to the growth of the poppy, and to make an official return of the figures. It would then be forever forbidden to bring under poppy-cultivation any land not hitherto used for that purpose. Certificates would be issued in respect of all land already used for growing the poppy, and the proprietor be compelled to reduce the growth each year by one-ninth part, and to substitute other crops suited to the particular soil.

It will, moreover, be incumbent on the magistrates to make personal inspection at unexpected times of such lands. The certificates, too, will have to be changed each year, till within the period of nine years the whole cultivation is rooted out. Non-compliance with this rule will entail confiscation by the state of the land in question.

Any local authority who succeeds in less time than the statutory ten years in giving effect to the prohibition in respect to the land in his jurisdiction given up to the poppy, and in completely substituting in place thereof the cultivation of other crops, should, after due inquiry into the facts, be recommended to the Throne for recognition.

ARTICLE 2. — *To issue licences to smokers in order to prevent others from contracting the habit.*

The vice of opium smoking is of long standing, and it may be reckoned that some 30 to 40 per cent. of the population are addicted thereto. The interdict must therefore be extended with some consideration for what is past, while being applied in all strictness for the future. All persons of the official class and the gentry, literary graduates and licentiates resident at their homes throughout the Empire must be the first to be compelled to give up the habit, in order that they may serve as an example to the common people. All smokers, whether of the gentle or lower class, together with their wives and female servants, must without exception report themselves at the Yamen of the local authority of their native place or place of residence. If they reside at a distance from such Yamen or any police station, they may send their names in collectively through the headman of the village.

Proclamations will be issued in advance by the local authorities giving the necessary directions, and forms will be supplied which smokers will have to fill in, giving their names in full, age, address, occupation, and daily allowance of opium; and a limit of time will be fixed for them within which they must report themselves as having given up smoking, due consideration being paid in this regard to the element of distance.

As soon as all the smokers have reported themselves, a register will be drawn up and a copy thereof be sent to the higher authorities for purposes of record and reference. At the same time, printed licences under the official seal will be prepared, and every smoker will be obliged to have his licence. These licences will be of two classes — (a) and (b). Persons over sixty years of age will get licences under class (a), while those under sixty will be enrolled under class (b), provided always that no person who has held a licence under class (b) shall be entitled to the issue of a licence under class (a) on subsequently attaining the age of sixty.

The license will contain the holder's name in full, age, address, daily allowance of opium, and date of issue, and will constitute the permit to consume and buy opium. Any person consuming opium without a licence, or purchasing the drug, shall on discovery or information duly laid be subject to such penalty as may be called for. After the first inquisition, inspection will proceed on the basis of the register, and no fresh applications for licences will be entertained, in order that the number of smokers may be strictly limited.

ARTICLE 3. — *To reduce the craving for opium within a limited time, in order to remedy chronic addiction thereto.*

After the licences have been issued, and putting out of consideration persons over sixty whose constitutions are already undermined, and in whose case the question of giving up the habit need not be pressed, all persons under sixty holding licences under class (b) shall have a limit set on the quantity of opium which they consume, to be reduced each year by 20 to 30 per cent., and to be totally given up within a few years. On becoming total abstainers, they will have to produce a bond signed by a relative or near neighbor, which will be presented to the local authority, and if found in order, the name of the party will be erased from the register, while the licence will have to be surrendered for cancellation. Returns of all such proceedings will then be made quarterly to the higher authorities. But if in spite of the liberal period of years allowed under this system there should be individuals who fail to become total abstainers within the allotted time, they must be regarded as wilful victims to self-abuse, and nothing remains but to expose them to punishment for not abstaining. In the future, therefore, if any holder of a class (b) licence exceeds the time limit without giving up the habit and surrendering his licence for cancellation, he shall, if an official, resign his office; if a graduate or licentiate, he shall be deprived of his rank and

diploma; and if he be of the ordinary people, his name will be recorded by the local authority as an opium sot. A special list of such names will be kept, and a return thereof be made to the higher authorities. Besides this, such names, with the person's age, will be affixed in a public place for general observation, and also be exhibited in the town or village where such person lives, that all may know his condition. Such persons will, further, not be allowed to take part in any annual or periodical meetings which may be convened for any purpose by the local notables, or in any respectable concern of life, so that it may be clearly shown that they are outcasts of society.

ARTICLE 4. — *To prohibit opium houses, in order to purify the abodes of pollution.*

Before the time limit is reached upon which the prohibition becomes absolute it would naturally be hard to suddenly prohibit the existence of shops for the sale of opium. But there is a class of opium dens which offer a continual temptation to youths and the unemployed to frequent. These places are in every respect noxious, and should be prohibited by the local authorities, one after the other; a term of six months being fixed for the complete cessation of this calling, and the substitution of another trade. If the time limit is exceeded they should be compulsorily closed.

Eating-houses and restaurants must also not be allowed to furnish opium for the use of guests, nor must guests be permitted to bring smoking appliances with them, under penalty of a heavy fine. Shops for the sale of pipe-stems or bowls, opium-lamps, or other smoking appliances, must also be given one year's time by the local authorities within which to close business, under penalty of a heavy fine. In any place where an excise is levied per lamp in opium-dens, such levy must be discontinued within one month.

ARTICLE 5. — *To closely inspect opium-shops in order to facilitate preventive measures.*

Although it is not possible to forbid at once the existence of opium-shops, steps must still be taken to compel their gradual disappearance, and under no circumstances can any new shops be allowed to open. All shops in any city, town, or village which sell the raw drug or prepared opium must be severally inspected by the local authorities, who will draw up a list of them in the form of a register, and issue to each a licence which will constitute their permit to carry on this trade. Once the inspection has been made, no additions to the number of shops will be allowed.

Whenever persons come to such shops to buy opium, raw or prepared, the shopkeeper must examine the customer's licence before he serves him, and without so doing must not sell any of the drug.

At the end of the year these shops must make a *bonâ fide* statement

in writing to the local authority of the amount of opium, raw and prepared, which they have sold. The local authority will register these returns, and reckon up the total amount sold in his district by all the shops together, so as to show the amount of decrease in each year and for the purposes of comparison, provided always that within the period of ten years the sale shall be entirely stopped. If the time limit be infringed, the shops will be compulsorily closed and the stock in hand be confiscated, besides the imposition of a fine of at least double its value.

Shops which from time to time drop out of the business must surrender their licences for cancellation. The licence must not be kept, under penalty of a heavy fine.

ARTICLE 6. — *To manufacture remedies for the cure of the opium habit under official control.*

There are many good remedies for curing the opium habit, and the high provincial authorities should appoint efficient and experienced medical officers to make a careful study of these, with a view to the selection of a number of prescriptions (suitable to the natural conditions of each particular locality) and the manufacture therefrom of pills or medicines, provided that such pills or medicines shall not contain opium-ash or morphia.

Such remedial medicines should then be bought by the local authorities, who will distribute them among the local charitable institutions or medicine-shops for sale at the original price, while poor persons will be allowed to obtain them free of charge.

The gentry and tradesmen will also be allowed to manufacture such remedies according to prescription for free distribution with a view to spreading this benefit more widely; and any person who can be shown to have promoted such distribution by his personal exertions or exhortation, and to have succeeded in breaking others of the opium habit thereby, shall be awarded honorary recognition by the local authorities.

ARTICLE 7. — *To allow the establishment of anti-opium societies in order to promote this good movement.*

There have recently been several instances of public-spirited individuals who have combined with others of their own class in founding anti-opium societies, and in mutually assisting in exhorting the abandonment of the habit. Such enterprises deserve the highest praise; and the high provincial authorities should direct the local officials to take the lead among the respectable men of standing in each place and develop the establishment of such societies, so that with each addition to the number there will be an additional centre of activity. But such societies must only be allowed to concern themselves with the single question of giving up opium, and must not discuss current politics or questions of local government, or other subjects not related to the abandonment of the opium habit.

ARTICLE 8. — *To charge the local authorities with the duty of leading the movement among the local gentry and heads of guilds, in order that it may prove really operative.*

The present measure depends entirely on the local authorities taking the lead among the gentry and heads of guilds in giving proper effect to its provisions. Success can only be attained by a loyal and conscientious effort in this direction. The high provincial authorities must therefore carefully examine each year into the reports of their inferiors, and study the returns of the number of consumers originally recorded and the number of abstainers, besides seeing whether due activity has been shown in the supply of anti-opium medicines, and in promoting the formation of anti-opium societies. By comparing these various records, they will be in a position to apportion praise and blame as due. They should also draw up an annual report for transmission to the Council for State Affairs, and to serve as a basis for examining the operation of this measure.

As regards the city of Peking, the officers in charge of all police stations, the captain-general of the Peking gendarmerie, and the governor of Peking (Shuntien-fu) will be responsible for the due execution of these provisions.

If, before the expiry of the term of ten years, it can be shown that there are already no opium smokers in any particular jurisdiction, the local authority shall be recommended for promotion.

In carrying out the survey of opium-bearing land, the inspection of opium dens and opium shops, and the issue of certificates and licences, as well as in the registration of smokers, the strictest injunctions must be imposed on the official assistants, clerks, and servants, that no exactions whatever will be permitted, under penalty for infraction of this rule, and upon information duly laid of the punishments prescribed for extortion.

ARTICLE 9. — *To strictly forbid the smoking of opium by officials, in order that an example may be set for others to follow.*

The complete prohibition in ten years of the use of opium applies to the general population. But the officials must set an example to the people. If they have such a vice, how can it be expected that they shall lead the people straight?

Now, it is desired to make this measure effective, and, with this end in view, it is absolutely necessary to start with the officials, and make the time limit for them more severe and the penalties for non-compliance more heavy, so that, as grass bends to the wind, the people may comply with their example.

From henceforth, all metropolitan or provincial civil or military officials of high or low grade who are over 60 years of age, and who are so strongly addicted to the opium habit that they can not break it off, will be put out of consideration, as if they were of the common people, and treated leniently.

All princes, dukes, and other hereditary nobles, presidents and ministers of boards and metropolitan yamêns, Tartar generals, governors-general and governors, military lieutenant-governors, deputy lieutenant-governers, provincial commanders-in-chief and brigade generals holding substantive appointments are the recipients of the Imperial favor to no small degree, and of exalted rank and standing. No deception or pretence on their part must be permitted in this matter. Any of these who have been in the habit of smoking shall be permitted to memorialize the Throne direct, praying for a limit of time to be fixed for them within which to give it up. During such period they will for the time being not be removed from office, but a substitute will be appointed to act for them. When they can show that they have given up the habit they will be allowed to resume office, but it must be clearly understood that no excuse of illness will be entertained as necessitating the further use of the drug beyond the appointed time. All other metropolitan and provincial officials, civil or military, substantive or expectant, of high or low grade, who are addicted to opium, shall be placed under the supervision of a delegate appointed by their superiors, and be directed to present a true statement of the facts of their case; and, without consideration as to whether their craving for opium is heavy or slight, they will be given six months within which to give up the habit altogether. At the expiry of this period they must apply for an officer to be appointed to examine them again, and enter into a bond, which will be filed. If they become seriously ill and fail to break off the habit within the stipulated time, they may represent the facts to their superiors, in which case any hereditary title they may possess will be transferred according to the proper rules of succession to another to hold, and, if they are officials, they will be retired with whatever rank they may be holding. If it be discovered that they are holding back the facts and infringing this rule by means of deception, they must be impeached and degraded, as a warning against any such trifling and deceit.

If the superior authorities are lax in examining, they shall be reported to the Throne for the determination of a penalty.

Further, all teachers and scholars in any schools or colleges, and officers and warrant officers of the army or navy, who are addicted to opium shall be dismissed within three months.

ARTICLE 10. — *To enter into negotiations for the prohibition of the import of foreign opium in order to close the sources of supply.*

The prohibition of the growth of opium and of its consumption is a measure of internal policy which we are justified in taking without further circumspection. But the question of foreign opium, which is imported from other countries, impinges on our foreign relations, and the Imperial commands should therefore be sought to direct the board of foreign affairs to make a satisfactory arrangement with the British

minister with a view to effecting an annual decrease within the next few years of the import of foreign opium *parri passa* with the decrease of native opium, so that both may be absolutely prohibited by the expiry of the time limit of ten years.

Besides Indian opium, the drug is also imported from Persia, Annam, and the Dutch Indies in no small quantities. In the case of treaty powers negotiations should similarly be entered into with their representatives in Peking to effect the prohibition of such import; while with non-treaty powers we can exercise our own prerogative in strictly forbidding the import.

All Tartar generals, military lieutenant-governors, governors-general, and governors should also direct their subordinate authorities and commissioners of customs to take preventive measures along the trade routes and frontiers to stop smuggling.

As regards morphia and the instruments used for its injection into the skin, the effects of which are even more injurious than those of opium itself, proper effect should be given to the stipulations laid down in article XI of the British Commercial Treaty, and article XVI of the American Commercial Treaty, and instructions be issued to all customhouses to disallow the import of any morphia and instruments into China which are not for medical use; while a strict prohibition must be enforced against any shops in China, whether native or foreign, manufacturing morphia or instruments for its injection.

ARTICLE 11. All Tartar generals, governors-general, and governors of provinces should direct the civil and military authorities in their jurisdiction to issue proclamations promulgating these rules for general observance.

In January of 1907, another forward step was taken when the Chinese government made certain proposals to Sir John Jordan, the British Minister at Peking, for the gradual abolition of the Indian opium traffic. After much discussion, the "Ten Year Agreement," as outlined in the SUPPLEMENT,[24] was accepted by both governments on January 27, 1908, and went into effect on the first day of the same month. This "Ten Year Agreement" forms the present basis of the Indo-Chinese opium trade. By it Great Britain agreed to reduce the total exportation of opium from India (67,000 chests per annum) by one-tenth of the then average Chinese importation of the drug (51,000 chests). The Chinese at first contended for a reduction by one-tenth per annum of the direct export of Indian opium to China. Had this been accepted, the Chinese im-

[24] *3*:264 (July, 1909).

portation of Indian opium would have fallen off by fifty-one hundred chests a year. The British proposition that the total export from India should be reduced by one-tenth of the actual export to China leaves sixteen thousand chests wandering about in the Far East and ready to pour into the country where the demand is greatest. This places the Chinese government at a disadvantage, for in the suppression of poppy cultivation in China, and the consequent scarcity of opium, the demand for and the price of Indian opium has risen, and without doubt part of the loose sixteen thousand chests will find their way to China, and so tend to defeat the object of Chinese statesmen.

On February 7, 1907, a Second Imperial Decree was published by the Chinese government as a reminder to all officials that it is in earnest in its anti-opium crusade.

Imperial Decree

A memorial has been received from the board of the interior devising general arrangements for the prohibition of opium; and whereas opium is injurious to the public health, we have already issued an edict commanding every province to fix a limit of time for its strict prohibition. The board having now recommended in their memorial the extension of branch Anti-Opium Societies, and that the opium dens throughout the provinces should be uniformly closed and prohibited as laid down in the new regulations, it is hereby commanded that all Tartar generals, viceroys, and governors shall take part with their subordinates in conscientiously carrying out these steps. But strict as must be the prohibition against smoking, it is even more necessary to forbid the cultivation of the poppy, in order to sweep away the source of evil. The responsibility is, therefore, placed upon all Tartar generals, viceroys, and governors to see to it that cultivation is diminished annually, as prescribed by the regulations submitted to us, and that within the maximum term of ten years the supply of foreign and native opium is completely cut off. There must be no laxity or disregard for this beneficial measure, which the Throne so ardently desires.

The war against opium moved apace. On April 17, 1907, as the result of a suggestion of Sir John Jordan to Sir Edward Grey, a movement was set on foot to compel the British Municipal Councils in China to close the opium dens in the British Concessions and Settlements.[25] So great an impetus had the new movement con-

[25] China No. 1, (1908), p. 11.

tracted that by August 9, 1907, Sir John Jordan again suggested to his government that both the export and import trade in prepared or smoking opium between Hongkong and the Chinese mainland be prohibited, and that both governments should take measures to prevent smuggling into their respective territories.[26] This was afterwards agreed upon between the two governments. June 26, of the same year, saw another Imperial Edict directed against opium:

Imperial Edict.

Opium is in the highest degree detrimental to the people. In an edict of last year prohibiting the use of it, the council of government were commanded to frame regulations and to direct all yamêns throughout the country to put a stop to it.

In the third month of this year (13th April–11th May) a further edict was issued, commanding that general instructions be given to act in strict accordance with the regulations which had been submitted to the Throne, alike in respect of the cultivation, sale, and consumption of opium.

The welfare of the people is a matter of great concern to the court, and this is a matter which must positively be put through. The governor of Peking and the Tartar generals, viceroys, and governors of the provinces are commanded to issue strict instructions to their subordinates to put the prohibition into actual effect, to make it a matter of familiar knowledge in men's houses, to get completely rid of the evil. The maritime customs should keep a strict watch on the foreign opium which is imported, and the places in the interior which cultivate native opium must annually decrease the amount cultivated, in accordance with the dates sanctioned. It is further commanded that the relative merits of officials in this respect must be recognized. If the instructions are zealously carried out by an official in his own jurisdiction, it is permitted to memorialize the Throne, asking for some encouragement to be shown him. If an official merely keeps up appearances and, while outwardly obeying, secretly disregards these commands, he is to be denounced by name for punishment.

It is also commanded that an annual return of the land under opium cultivation be made, by way of verification and to meet the desire of the court to relieve the people of this evil.

On November 27, 1907, Sir John Jordan was able to send a most important memorandum to his government, showing that the edicts against the cultivation of the poppy and the use of opium by the Chinese had been most effective in many of the provinces.[27] On May

[26] *Ibid*, p. 19.

[27] *Ibid*, p. 31.

19th Mr. Morrison, the *Times* correspondent, was able to write from Peking:

> The first six months following the issue of the Anti-Opium Regulations expired on Friday, when the last of the opium dens in Peking was closed. All the restaurants and houses of bad character where formerly the use of opium was universal some time ago, ceased to permit smoking on the premises. Tang Shao-yi, the moving spirit in the campaign at Peking, assured a foreigner that the anti-opium sentiment was constantly gaining force. He was satisfied with the effect of the new regulations, especially in this province where the public use of opium had almost disappeared, and in his own province of Canton — with one or two exceptions he knew of no new office given to a known opium smoker — it is added the movement is certainly popular, and is supported by the entire native press, while a hopeful sign is, that the use of opium is fast becoming unfashionable.

In a later survey of some of the Chinese provinces, especially Yünnan, Mr. Morrison was able to speak in high terms of the energy of the viceroys in stamping out poppy cultivation. During 1907, measures had been taken to close out the opium dens in the Japanese Concessions. In the Russian Concessions at Hankow and Tientsin opium smoking had been prohibited by order of the municipal council, and in the leased railway territory the administration came to an agreement with the Chinese to enforce the opium regulations in the near future. The French closed all of their dens in the French Concessions at Tientsin, and in the French Settlement at Shanghai steps were taken to close part of the dens there. Great Britain had closed all opium establishments in her Concessions in China, and part of those in her Settlement at Shanghai. Italy had closed out all the opium dens in her Concessions of Tientsin by January, 1907; Austria also, in her Concession of Tientsin by the 8th of August of the same year. China having no treaty relations with Persia and Turkey, was able, early in 1908, of her own free will, to regulate the opium trade with these two countries on the basis of the "Ten Year Agreement" with Great Britain. On April 17, 1908, an Imperial Decree was issued appointing Imperial Commissioners for the enforcement of the prohibition of opium. Under this Decree Prince Kung, the Assistant Grand Secretary Lu Ch'uan-lin, and the Associate Directors of the Senate, Ching-hsing and Ting Chen-to, were named the Im-

perial Commissioners for the enforcement of the prohibition of opium. They were to engage skillful physicians, Chinese and foreign, and forthwith establish a special Investigation Office for the eradication of the opium habit. All officials in public office known to be addicted to opium smoking are to be reported to the president and vice president of the board concerned, for punishment. If minor officials are found addicted to opium, their superior officers must be reported to the board for punishment. The Commissioners must put aside all personal feelings and perform their duty ceaselessly and fearlessly. Should the prohibition of opium still fail to show satisfactory results, the Commissioners will be held to account. Thirty thousand taels were provided out of the revenue from the taxes on opium for expenses connected with establishing the office, and sixty thousand taels for annual expenditure.

March 22, 1909, saw the issue of an Imperial Decree, especially thanking foreign philanthropists and governments for aid in the battle against opium.

On the 23rd of May, 1908, the following Imperial Rescript was issued. It provides supervisory regulations for the prohibition of opium:

PROHIBITION OF OPIUM: SUPERVISORY REGULATIONS

SECTION 1. — *Diminution of cultivation*

ARTICLE 1. Returns of the amount of land under opium cultivation, the names of the owners, and the amount of opium produced shall be made by all local officials within six months to the high provincial authorities, who shall forward collective reports to the board of finance and board of the interior.

ARTICLE 2. The ten years' period within which opium is to be abolished shall be reckoned from Kuang Hsü (1906–7), and the cultivation of opium is to be diminished in accordance with the regulations laid down by the grand council. No opium must ever be grown on land not hitherto under opium cultivation, and in the case of land already under opium cultivation the amount must be annually decreased by one-eighth, taking as a basis the figure given in the returns for Kuang Hsü 34 (1908–9). The cultivation of opium will thus cease entirely in Kuang Hsü 41 (1915–6). Returns shall also be made from time to time as to what crops are being grown on the land withdrawn from opium cultivation.

ARTICLE 3. Permits, sealed by the provincial authorities, shall be

issued by the local officials to opium growers, the permits being altered annually. Any person growing opium without a permit shall be liable to punishment. A fee of 15 cash per mou shall be levied on each permit, but no further charge whatever may be made.

SECTION 2. — *Public Hongs*

ARTICLE 4. Since the inauguration of a consolidated tax on native opium, the provinces of Anhui, Honan, and Shansi have already established a system of public hongs for the sale of native opium appointed by the Branch Consolidated Tax Office and the local official. These public hongs are responsible for the payment of the tax on native opium, and the grower must sell and the dealer purchase opium through them. The warehouseman must also report all purchases and sales of opium to the public hong, which sees that the taxes are paid. This system will now be extended to the other provinces, and these public hongs shall keep a daily record of all sales of opium, giving the names of the purchasers, and shall report to the Branch Consolidated Tax Office. A general report, setting forth the reductions effected by each public hong, shall be furnished annually to the board of the interior by the directors-general of native opium taxation. In the case of Szechuan, Yünnan, Kweichow, Turkestan, and Manchuria, where there is no consolidated tax on native opium, the provincial authorities shall take action on the same lines.

Native opium warehousemen must hold permits from the Local Consolidated Tax Bureau and local official. Without such permits they will not be allowed to purchase opium either through the public hong or from the grower.

SECTION 3. — *Opium Shops*

ARTICLE 5. Returns shall be furnished within six months by the local officials, through the provincial authorities, to the board of the interior of the number, situation, capital, &c., of opium shops in their jurisdiction. No new opium shops must be opened.

ARTICLE 6. Opium shops must have permits issued by the provincial authorities and changed annually. Fees of from 2 to 6 dollars will be charged for these permits, according to the capital of the shop.

ARTICLE 7. Monthly returns shall be furnished by every opium shop of the amount of opium sold. No opium must be sold except to persons provided with permits. A general annual report shall be furnished by the provincial authorities to the Board of Interior.

ARTICLE 8. All opium shops should endeavor to establish some other line of business apart from the trade in opium, for this trade must cease entirely within the fixed time limit.

SECTION 4. — *Opium Divans*

ARTICLE 9. Under the instructions issued by the government council in Kuang Hsü 32 (1906–7) all opium dens were to be abolished within

six months. Should there still remain any opium divans, or tea-houses, wine-shops, &c., providing facilities for opium smoking, they must be closed at once under pain of severe punishment.

SECTION 5. — *Utensils for Opium Smoking*

ARTICLE 10. Instructions have already been issued in Kuang Hsü 32 (1906–7) for the closure of all shops selling utensils for opium smoking. The local officials must now investigate whether any shops for the manufacture or sale of such articles still exist, and, if any are discovered, they must be closed and the proprietors fined.

SECTION 6. — *Opium Smoking*

ARTICLE 11. The authorities of each province shall fix a time within which returns shall be furnished by each local official of the name, residence, and age of every opium smoker within his jurisdiction. An annual report embodying these returns shall be made by the provincial authorities to the board of the interior.

ARTICLE 12. Opium smokers must obtain a permit from the local officials, stamped by the provincial authorities, and renewable annually. Only those holding such permits may purchase opium. The amount of opium required for daily consumption shall be entered on the permit, and not more than that amount can be purchased.

SECTION 7. — *Cure of the Opium Habit*

ARTICLE 13. Offices shall be established by local officials for the purpose of issuing to medicine shops and philanthropic institutions anti-opium medicines recommended by the board of the interior. These medicines shall be sold at cost price or given free to poor persons. Provincial authorities should send to the board, for investigation, samples of any good anti-opium remedies discovered by persons in their jurisdiction.

ARTICLE 14. Local officials should encourage the foundation of societies for the cure of the opium habit, the publication of anti-opium literature, &c., but such societies must not be allowed to concern themselves with anything apart from the abolition of opium.

ARTICLE 15. Local officials shall investigate whether any of the medicines sold by drug shops or other establishments in their jurisdiction are compounded with morphia, and shall take steps to prevent the illicit sale of that drug.

SECTION 8. — *Rewards and Punishments*

ARTICLE 16. A local official who has furnished by the proper date all the returns called for under these Regulations may be recommended for favourable notice to the board by the high authorities of his province.

ARTICLE 17. A local official who has enforced within the fixed limit of time all the prohibitions specified in these regulations may be recom-

mended for favourable notice to the board by the provincial authorities.

ARTICLE 18. If a local official succeeds within the space of one year, and without inflicting undue hardship on the people in his jurisdiction, in reducing the amount of land under opium cultivation, the number of opium shops, and the number of smokers by more than three-tenths, the viceroy or governor may present a memorial recommending that he should be granted some special mark of approbation by the board.

ARTICLE 19. A local official who fails to furnish the proper returns by the proper date or who makes false returns shall be reported to the board for punishment.

ARTICLE 20. A local official who fails to enforce within the fixed limit of time the various prohibitions specified in the regulations shall be reported to the board for punishment. A false return under this article will involve still more severe punishment. The superior officials will also, if they were aware of the circumstances, be liable to the same punishment.

ARTICLE 21. A local official who fails to effect within his jurisdiction in a year a decrease of at least one-eighth in the amount of land under opium, the number of opium shops, and the number of smokers shall be reported to the board for punishment.

ARTICLE 22. The present regulations shall be carried out in accordance with those laid down by the government council Details shall be arranged by the provincial authorities in accordance with local conditions.

ARTICLE 23. The amount of fees collected under these regulations must be reported periodically to the board, and will go to meet the expenditures connected with the prohibition of opium. No other charges beyond the fees fixed by these regulations may be levied, and should it afterwards appear advisable to increase the amount of these fees a joint memorial on the subject will be submitted by the board of revenue and the board of the interior.

REGULATION OF IMPORT OF PERSIAN AND TURKISH OPIUM

It has been mentioned that China having no treaty relations with Persia and Turkey, was able to impose her will as to the importation of opium from these countries. In regulating the Persian and Turkish opium trade, she followed the lines of the Anglo-Chinese Ten Year Agreement. The Regulation is as follows:

From the 1st of January, 1909, any merchant wishing to import into any open port of China any Persian or Turkish opium must apply to the commissioner of customs at Kowloon for a special permit — one for each chest of opium. This permit shall state that the opium may be shipped to any open port in China, and that, on its arrival, duty and *likin* will be paid in accordance with the regu-

lations. Any Persian or Turkish opium shipped to China for which this special permit can not be produced shall be confiscated.

Taking 1,125 piculs as the mean annual import of Persian and Turkish opium, this quantity shall be reduced every year by one-ninth, i. e., 125 piculs. Thus in 1909 special permits will only be issued for 1,000 piculs, and by making a similar reduction annually the import will entirely cease in nine years.

After 1916 no more special permits will be issued, and the import into China of Persian and Turkish opium, as well as that of Indian opium, will be completely suspended.

The special permits will only be issued to merchants who have hitherto, to the knowledge of the Imperial Maritime Customs, been engaged in the trade in Turkish and Persian opium. In fixing the number of special permits to be issued annually to each merchant, the total import during the two years 1906–7, and the quantities imported by each merchant during those years, will be taken as a basis, the number of permits being annually decreased.

It may well be asked at this point: what has been the effect of the edicts and regulations issued by the Chinese government? The movement against opium in China operates over so vast a territory and affects so large a population that it would take up too much space to detail the whole extent of the reformatory movement. It is always difficult to reform a people by legislative enactment. Moreover, apart from this difficulty, the fiscal side of the opium question is a very important factor to China. The Chinese central and provincial governments have been in receipt of over seven million of pounds sterling[28] from a tax on the internal production of opium, and duty and likin on that imported from India. This must be replaced, and the matter is now being considered by the Board of Revenue. It is to the credit of the morals of the Chinese authorities that they are pushing the crusade against opium even though in their wisdom they have not yet found a means to replace the disappearing opium revenue. Beyond a doubt, in the near future the question of replacing the opium revenue will be put on a satisfactory basis.

[28] Mr. Leech's estimate, "Opium Question in China," China, No. 1, 1908. The estimate is probably too high.

A few instances will illustrate the vigorous manner in which the provincial and municipal authorities are attempting to carry out the spirit of the edicts and regulations.

Foochow, with a population of 650,000, was one of the first great cities to be dealt with. The date fixed was the 12th May, 1907. Several days before, a thousand threatened traders, conscious that their craft was in danger, met in one of the temples, drafted a remonstrance, and subscribed a large sum of money therewith to defend their interests.

They met in vain. The man who presented the petition was locked up. The resistance collapsed, and on the 12th three thousand shops in Foochow city and suburbs ceased to traffic in opium. One man who held on, trusting to his influence with officialdom, was summarily lodged in jail, and his property confiscated. Two or three others were marched through the streets in chains. So far as is known there did not, a week after, exist a single opium den in the city. Strong vigilance committees helped the officials. The day of closing was a day of general rejoicing. Flags floated everywhere, and processions of students paraded the streets with banners; "unbounded joy" was shown over the victory won. Months after, it is said, "Bands of students frequently go about the streets in order to see that the Edict is complied with. Several hundreds of citizens have been fined, or otherwise dealt with. There are three opium refuges in the city, and four others on the island of Nantai. These are financed by the gentry. There are in addition many private refuges." [29]

The correspondent of the *Morning Post* observed June 28, 1906:

The closing of the opium shops in the native city (Shanghai) is apparently effective. The extraordinary precautions taken by the native authorities prevented the expected trouble. Two Chinese cruisers were anchored in front of the Chinese Bund, to protect the opium hulks, while parties of soldiers and native volunteers and police patrolled the streets and visited the shops.

Officials who have disobeyed the edicts have not escaped, for on October 10, 1907, an Imperial edict appeared ordering Tsai Kung, Prince of Chuang, First Order; Lu Pao-chuang and Chen Min-Kan, president and vice-president respectively of the Censorate, Kwei Pin, Prince of Jui, First Order, to resign their offices because they had not broken off the opium habit. As a result of these enforced resignations, large numbers of the various ministries and the metropolitan departments were awakened. Sick leave was granted to

[29] Rowntree: "The Imperial Drug Trade," p. 297.

opium smoking officials at the rate of three or four per day. The places of those taking sick leave was kept open for three months, and if at the end of that time they had not effectively broken off the habit, their positions passed to others. The late Empress Dowager gave the inmates of the palaces three months to get rid of the opium habit. Those who did not do so were punished with one hundred blows and expelled the palaces. Dr. Morrison, of *The Times,* stated on the 19th of May, 1907, that in the capital province of Chihli,

> The results of the anti-opium movement are wholly satisfactory. In Canton province and in Kwang-si also they are satisfactory, and to a less degree in Szechuan, Che-kiang, Nganwhei and Shansi. Unsatisfactory are Shantung and Shanghai; but in Nanking, while practical effects as regards the general public are not apparent, effective measures have enforced the suppression of the habit among the military and student classes. Especially unsatisfactory are the Yangtsze provinces under Chang Chih-tung, who formally wrote against opium. Hsu Shih-chang, the new Viceroy of Manchuria, Tsen Chun-hsuan, the new president of the Ministry of Communications, and Duke Tsai-tse, the new president of the Ministry of Finance, are all strongly against opium, as are the new viceroys of Yün-nan and Sze-chuan, two of the greatest opium growing provinces.

Correspondents of the European and American papers have, for the past two years, been telling of bonfires made of opium pipes and the disgrace of officials who have not got rid of the opium habit, and of the closing up of the opium dens in all the large centers of population. Mr. Leech, Councillor of the British Legation at Peking, reported on June 24, 1908, that there was some apathy amongst the provincial authorities. He cites two principal reasons for this, i. e., the fact that so many public officials are still addicted to the drug, and the question of provincial finance and the finding revenue to replace that at present derived from opium. But he observes that,

> On the whole, it may be said in regard to the anti-opium regulations that officials showing sufficient force of character to uphold them are almost sure of support from the people, prompted as the latter are by the force of public opinion, a force formerly unknown in China and of recent growth, but which is well upheld by the native press, and incipient moral education of the nation, and the awakening of a national conscience. The *Times* correspondent has aptly used the expression "bad form" in describing the view of the educated Chinese towards opium

smoking in public, and should this sentiment gain in moral force, there seems no reason why it should not develop into "losing face," that most powerful of all rules of conduct in China, corresponding either to "dishonorable," or "ungentlemanlike," as the case may be.[30]

Mr. Leech then reviews the question of opium suppression in the various Chinese provinces. On the one side of the account we have such provinces as Shan-si, where the dens and shops may be said to be generally open and uninspected, and the poppy cultivation has been slightly reduced. In the province of Shen-si there is no lack of proclamations; but the officials take no material steps to stop the use of the drug. In some districts poppy cultivation has be reduced by means of high taxation. On the other side, we have a province like Kan-su where the use of the drug is restricted by proclamation, and the restriction is enforced, causing heavy losses to merchants. In the south of Shantung province the cultivation of the poppy has been reduced five per cent, wheat being substituted. Kiang-su province continues to be amongst those foremost in combatting the evil; a stigma has been attached to opium smoking which it has not previously possessed. In Fuk-hien province the area of cultivation of the poppy has been reduced about one-fourth. In Hunan province a Wesleyan missionary who had recently travelled two thousand miles in the eastern part of the province, reported to Mr. Leech that he had found that in some places it was impossible to purchase opium, and the provincial treasurer, who was a warm supporter of the anti-opium movement, was prepared to guarantee that no poppy would be grown in the province in 1909. There is no doubt that a substantial decrease in poppy cultivation has taken place throughout China. To what extent it is impossible to state, for the Chinese government has no scientific system of record. Morse [31] has estimated that the total production in all China for 1905 was 376,000 piculs. For the year 1906, an estimate based on customs reports places it at 584,800 piculs.[32] Mr. Leech [33] estimates that for 1907 the total production was 331,000 piculs. An estimate based on customs reports

[30] Opium Question in China. China No. 2 (1908).

[31] The Trade and Administration of the Chinese Empire, p. 350.

[32] Chinese Report, International Opium Commission.

[33] China No. 1, 1908.

gives the total production for 1908 at 367,250 piculs. The Chinese themselves accept the estimates for 1906 and 1908 as based on the customs report. Although these figures are estimates only, still they will have to be taken as the official estimate of the Chinese government. If so taken there appears to have been a reduction since 1906 of 217,550 piculs in the internal production of opium. This reduction, or a fair part of it, indicates that China is capable of acting up to the "Ten Year Agreement."

As the time for the meeting of the Commission approached, Great Britain not only expressed sympathy for the Chinese government in its effort to suppress the misuse of opium, but carried out practical measures to that end, and at the same time in regard to her problem in India and the Crown Colonies. In regard to India, it has already been pointed out that the British House of Commons passed a unanimous resolution condemning the Indo-Chinese opium trade (*vide supra, Part 1*), and Lord Morley's speech in support has been partially quoted. Since then Lord Morley has stated the position of the Indian government not only in regard to China, but to the whole question of the Indian opium trade, and in a way not to be misunderstood. In August, 1907, Lord Morley authorized the following statement:

> The first concerning his insistence that China must fulfil her part of the agreement founded on her own proposals,[34] if England is to do the same. Mr. Morley explained that from his point of view such insistance was intended, not as a threat to China, but rather as a help to her to hold fast to her obligations, and to go forward with their fulfillment.
>
> The second point concerned the action of our (*i. e.*, the British) government in case China should fail to carry out her own proposals — was it to be understood that the present movement for the gradual extinction of the Indian opium export should, in that case, come to an end? Mr. Morley did not see that that was implied. There were two broad grounds for the present movement; one, the proposals of the Chinese government, the other the resolution of the House of Commons on the 30th May, 1906. If the first should fail, the second did not necessarily cease to be a ground of action.
>
> The third point concerned a possible plea on the part of China that the process of reduction might go on more swiftly than her own first proposals contemplated. Would Mr. Morley be prepared to consider such

[34] The Ten Year Agreement, *vide* SUPPLEMENT, 3:264 (July, 1909).

a plea if deliberately put before him by the Chinese authorities? In reply Mr. Morley said that he could only refer to his statement on the 30th May 1906, that any deliberate proposals from the Chinese government on the subject of opium would meet with sympathetic consideration.[35]

It will be seen that the British government in contracting the Ten Year Agreement with China intended that it should be a help to her to hold fast to her obligations, for the Indian side of the opium question was, under certain circumstances, a question by itself, and would be treated quite apart from any action of the Chinese government on its own internal opium problem, and if China wished for further assistance from Great Britain, her proposals would be sympathetically considered. There can be no doubt that this is the confirmed view of the British government and of a large majority of the British nation. To substantiate the British position, the House of Commons took a step further on May 6, 1908, when the following resolution was proposed and adopted unanimously:

> That this House, having regard to its resolution unanimously adopted on May 30, 1906, that the Indo-Chinese opium trade is morally indefensible, welcomes the action of His Majesty's government in diminishing the sale of opium for export, and thus responding to the action of the Chinese government in their arrangements for the suppression of the consumption of the drug in that Empire; and this House also urges the government to take steps to bring to a speedy close the legislation licensing the opium dens now prevailing in some of her Crown Colonies — more particularly Hongkong, the Strait Settlements and Ceylon.

Colonel Seeley, the Under Secretary of State for the Colonies, accepted the resolution on behalf of the government, and announced that the following telegram had already been sent to the governor of Hongkong:

> His Majesty's government has decided that steps must be taken to close opium dens in Hongkong, as they recognize that it is essential in dealing with the opium question in Hongkong that we must act up to the standard set by the Chinese government.

That this was no mere party resolution is proved in that it passed unanimously and that it was strongly supported by the Right Honor-

[35] Rowntree: "The Imperial Drug Trade," p. 285.

able Alfred Littleton, Secretary of State for the Colonies in the late Conservative government.

As completing the position of the British government the Chief of the Indian Administration may be quoted in regard to the opium traffic. Lord Minto said in speaking on the Indian Budget, March 27, 1907, that,

> The Indian government is not entitled to doubt the good faith of the Chinese government as to the objects of their proposals, (i. e. the "Ten Year Agreement"). There is, no doubt, throughout the civilized world a feeling of disgust at the demoralizing effect of the opium habit in excess; it is a feeling which we can not but share. We can not with any self-respect refuse to assist China on the grounds of loss of revenue to India.

The self-governing colonies have not lagged; for Canada prohibited the importation of opium except for medicinal purposes in July, 1908. The governor general of Australia, by virtue of the Commonwealth Customs Act mentioned above (*Part 1*), issued a declaration dated December 29, 1905, that from the 1st of January, 1906, the importation of opium, suitable for smoking, into Australia, will be prohibited absolutely, and that opium shall only be imported for medicinal uses and by persons licensed. Anticipating the House of Commons resolution of May 6, 1908, in regard to the use of opium in the Crown colonies, the government of Ceylon appointed a committee on the 12th June, 1907, to inquire into and report upon opium. The committee reported on the 5th of December, 1907, condemning the Ceylon opium trade, recommending that the importation, distribution, and sale of opium be made a government monopoly, and that the use of the drug, except for medicinal purposes, should be entirely prohibited after a definite period.[36] On the 19th July, 1907, the governor of the Strait Settlements appointed a commission of six members for the purpose of inquiring into the opium habit. On the 15th June, 1908, the commission reported. The report may be said to have been profoundly influenced by the Royal Commission Report of 1895. Its conclusions were about the same. But it is expected that the British government will disregard it and order

[36] Correspondence on Consumption of Opium in Ceylon, White Book, 1908.

the closing of the opium business in the Straits and Federated Malay States.[37] At Hongkong discussion has waged furiously as to the right and the wrong of the opium habit, but the local government has gone as far as to prohibit by ordinance the exportation of smoking opium to China and to French Indo-China. Although, by special pleading and otherwise, the government is fighting hard for its opium revenue, the British Colonial Office has ordered the closing of the opium dens by March 1, 1910. This will mean a loss of revenue to the colony of about 700,000 gold dollars. But it is possible that the Imperial government will make some sacrifice to assist not only Hongkong, but the Straits and Ceylon and the other colonies whose finances will be affected by the loss of the opium revenue. Thus history repeats itself. For having recognized the immorality of the opium traffic and its consequences, the British people have begun a determined effort to sacrifice a large revenue to the end that a widespread evil may cease. The historic parallel is the old British slavery question.

France has placed herself in line with the new movement. On the 22d of August, 1907, a commission was appointed to study measures to be progressively adopted for the gradual suppression of opium smoking in French Indo-China. As the result of the work of the commission,[38] no new opium dens are to be authorized. The price of the drug is to be increased and officials known to be opium smokers are excluded from promotion. The minister of the French Marine has issued a circular prohibiting opium smoking on board French men-of-war. On October 5, 1907, the governor general issued a circular forbidding in the most formal terms the use of opium to all European civil servants and agents of all services and of all ranks. Anyone infringing this prohibition is to be denounced at once and rigorous measures will be taken against him. Culprits are to be deprived of all "inscription en tableau," and of all promotion. All European officials who are such confirmed smokers that they can not abandon the habit at the end of three months, will

[37] Straits Settlements and Federated Malay States Opium Commission, Singapore, 1908.

[38] The Commission reported Feb. 7, 1908.

be immediately dismissed the service. Of great importance has been the prohibition of the sale of Yünnan opium in Cochin China and Cambodia. The result of all these measures has been a decrease in the purchase and sales of opium by some 45 per cent. The very heavy tax which the French Indo-Chinese government has imposed on the sale of opium has restricted its use to the wealthier Chinese. The only notable exception to this is the coolie population, of the town of Cholon in Cochin-China, where one-half of the male adults smoke. The French government is hopeful that in the near future the entire traffic in, and the use of smoking opium will come to an end.

In the United States public opinion was aroused as the result of the work of the American Opium Commission [39] during the summer of 1908. Investigation showed that the use of morphine was a widespread evil, and that the habit of smoking opium was no longer confined to the Chinese population. On the 9th of last February a statute was passed making it a penal offense to import opium into the United States except for medicinal purposes. This statute went into effect April 1, 1909. The prohibitory legislation of the Philippine Islands went into effect March 1, 1908.

Japan can not be said to have made any step towards regulating her opium business in Formosa to final extinction, although it is her professed object to do so. On the 21st of September, 1908, the King of Siam declared that

> It was unquestionable that opium had an evil effect upon its consumers and casts degradation upon every country where the inhabitants are largely addicted to the habit of opium smoking. There is no reason to doubt that the most earnest desire of nearly every country in the world is to suppress this noxious habit.

The King goes on to discuss the financial difficulties confronting him in his desire to suppress the use of opium. But he continues,

> Notwithstanding these great obstacles which we see standing in our way, it is, nevertheless, our bounden duty not to neglect our people and allow them to become more and more demoralized by indulgence in this noxious drug.

[39] Report on Opium, its Derivatives and Preparations, Feb., 1909.

Since that speech, the Siamese government has executed special measures in the administration of the opium monopoly, whereby the spread of the habit will become gradually lessened until it is entirely suppressed. Thus Siam has joined the new movement against opium which began with the more active entrance of the United States into Far Eastern affairs.

This review of the movement against the misuse of opium in its later phases has made no mention of the efforts of the various Anti-Opium Societies to call the governments to action. It should be mentioned to their credit that when the new movement began, their interest in it was active, self-contained, and effective. Before dealing with the Commission itself, it is fair to plead that much of the anti-opium legislation that occurred prior to the meeting of the Commission should be placed to the credit of the Commission. From the date of the original letter calling for the Commission, the United States government made strenuous efforts both by study and legislation to appear at Shanghai with clean hands. The other governments taking part were beyond doubt animated by a like motive.

THE OPIUM COMMISSION ITSELF

When the Commissioners representing the various powers concerned met at Shanghai, it was found that they had to all practical purposes followed the programme as laid down by the United States government — that is, each delegation came prepared to lay before the Commission as a Whole a report on opium as it affected their national, dependent, and protected peoples. On the American Delegation naturally devolved the leadership in the Commission. Organization was quickly completed, largely through the courtesy of the British and Chinese governments in instructing their delegations to support Bishop Brent for the presidency of the Commission.[40]

[40] Upon taking the chair Bishop Brent said: "*Fellow Members of the International Opium Commission:* In electing me your Chairman you have conferred an extraordinary honor on the government which I represent. In behalf of the United States of America and also in behalf of my esteemed colleagues, I beg to think you for this distinction. * * *

"The question that brings us together — the opium question — is an extremely difficult one and I think the very first thing that all of us should do is to

The American Delegation approached its work with some diffidence, for, although it had developed that the American people were more largely interested in the opium problem than was at first thought, still the revenue at stake was a small matter compared to that of Great Britain, France, The Netherlands, Siam, and other countries represented. However, the American Delegation were animated by a few fundamental principles. It was assumed that the

frankly recognize the fact and openly admit it. It is a great problem and we can hope to reach a successful solution of it only by facing facts and facing them squarely. We must have courage, and it seems to me that two principal features of courage are sincerity and thoroughness. All great problems go through two distinct stages. The first stage is what might be termed the emotional stage; it is based largely upon sentiment and ideals that are conceived in the inner self, sometimes more independent of facts than is warranted. In the problem before us, for a long period we have been passing through this preliminary stage — what I have termed the emotional stage. The emotional stage finds expression in agitation. We have had agitation. Now I believe we are at least midway in the second stage, when men deal with ascertained fact, and on the basis of ascertained fact reach certain conclusions of a practical character that will enable those upon whom the responsibility rest to arrive at some final conclusion.

"The first steps towards this International Commission were taken some time since by the government which I have the honour of representing. The negotiations for the establishment of the Commission have covered a considerable period of time. At first it seemed wise to restrict the nations that would take part in this investigation, or Commission of Inquiry, to those which through territorial possessions, agriculture, or commerce, were actively interested in the opium question in the Far East. Since that time the scope has been considerably widened. Countries that have not the problem in its more acute form, as in the case of my own country and that of other countries similarly situated, were by mutual consent included by the powers already interested, so that now I think we may say we are in a very real sense an International Commission. Almost at the last moment — indeed at the very last moment — two countries without a serious opium problem of their own were included by their expressed desire, and by the ready acquiescence of all other countries that up to date had notified their willingness to take part in the inquiry. Last summer it was decided by the American Commission — and notification was sent to all other governments concerned — to study every phase of the opium question in their own territory, including the homeland. So that, presumably, in this International Commission, as we are desirous to ascertain all facts that will enable us to come to some satisfactory conclusion, we shall agree in the desire to receive such information as is presented regarding the various aspects of the question in all the countries represented on the Commission.

"It devolves upon me to pronounce with emphasis that this is a Commission,

mere existence of the Commission was tantamount to acknowledging that the traffic in opium and its misuse was immoral, therefore the American Delegation determined to use the term *moral* as seldom as possible in any discussion. Then, again, it was decided that the opium problem should be regarded as a problem of to-day, and that no historical references should be needlessly made. It was agreed that the last century phase of the question was of interest to the historian, but that discussion of it would lead to no practical results

and as those who are informed — as all of you must be in matters that pertain to international affairs of this kind — a Commission is not a Conference. The idea of a Conference was suggested, but it seemed wise to choose this particular form of action rather than a Conference, because, for the present at any rate, we are not sufficiently well informed, and not sufficiently unanimous in our attitude, to have a conference with any great hope of immediate success. Further, this Commission is a temporary Commission as distinguished from some of the permanent Commissions already in existence, and if we were to look for the source of our origin, I think we would find it in the articles of the First Hague Conference, which provides for such International Commissions of Inquiry where points of difference on matters kindred to that which is before us arise between the powers. So that in all our deliberations and in all our committee work, we must bear in mind that we are to confine ourselves to facts that will enable us to reach, I trust, certain unanimous resolutions and, perhaps, some recommendations of a practical, broad and wise character in connection with those resolutions. But, if I may be permitted to make a suggestion to this assembly, it seems to me that it would be extremely wise if we were to rule out of our deliberations what might be termed useless historical questions beneath which a great deal of controversy lies hidden, and which would only tend to fog the issue. The one way to reach a satisfactory solution of a grave problem is to simplify, as far as possible, the elements of that problem, and I believe that history bears me out when I say that no great question has ever been satisfactorily settled until men have come to a realization of the fact that purely side issues, and controversial matters which do not touch the main question, must be set aside and ignored. They may be of interest, but they are of no practical importance, and, indeed, are impediments in the actual working out of the main question.

"I feel that I am speaking not merely for myself and my colleagues on the American Commission, but for this distinguished assembly, when I say that we are here to do such work as will bring the utmost credit to our respective countries and the utmost benefit possible to mankind. We must study this question in its every aspect — moral, economical, and commercial, diplomatic also, if you will — and we must study it, as I have already said, with those two phases of courage which will bring us to a happy conclusion of our labors — with sincerity and thoroughness.

"Nothing more remains for me to say, gentlemen, except to announce that this International Opium Commission is now organized and ready for business."

and might considerably fog the issue. The American Delegation concluded that the bane of all past reports on opium was the minority report or the dissenting opinion, that time after time such reports and opinions had thrown the opium question again into the melting pot. It was decided, therefore, that no conclusion would be urged that could not be carried by an overwhelming majority, or unanimously. It was recognized too that the acts of the Commission would be important as an historical precedent, and it was determined that the Commission, so far as the American Delegation was concerned, should strictly adhere to the rules in regard to commissions of inquiry as propounded by the First Hague Conference, and that the rules under which the Commission operated should, as nearly as possible, comply with the rules of the Second Hague Conference. As illustrating the spirit in which the American Delegation entered the Commission, the address of the president on taking the Chair may be consulted.

Bishop Brent, on taking the chair, read, for the benefit of the delegations, the letter of instructions issued by Mr. Root to our conferees at the Second Hague Conference.[41] That had a good effect in that it showed that the American Delegation was not at Shanghai to take an extreme position, even though it was recognized by all the delegations that the United States government and people stood for immediate and total prohibition of the misuse of opium. With some thirty-five or forty delegates present there was the danger that there might be much useless and perhaps emotional discussion. But this was avoided by according to each delegation but one vote, and thereby making the leader of each delegation on the floor the mouthpiece of his government. This practically confined discussion and oratory to thirteen delegates. The rules under which the Commission worked may be of interest, and are therefore included in a footnote.[42]

[41] Second International Peace Conference, p. 7.

[42] "It is resolved:

"1. That the Chair shall be addressed as 'Mr. President.'

"2. That no delegate shall continue to speak until recognized by the Chair.

"3. That when a vote is taken each delegation shall have only one vote. On questions of procedure or discipline, the President — in the event of a vote being equally divided — shall have a deciding vote.

It will be seen by rule 5 that each delegation was required to report on its own opium question without discussion or debate. That rule resulted in the first half dozen sessions of the Commission being very businesslike and of short duration, and by the twenty-second of February, each delegation had placed its report before the Commission as a Whole, and the entire opium question was in scientific

"4. That immediately upon the adoption of these rules, the President shall call for the presentation of reports concerning the various phases of the opium question in the territories and dependencies of their respective countries from the delegations taking part in the International Opium Commission.

"5. That each delegation in its turn (alphabetically) shall then lay a report covering its data on the opium question before the Commission, without discussion or debate. It shall be within the power of the President to allow the presentation of any report to be postponed on due cause shown.

"6. That a copy of each report shall be supplied to each member of the Commission, and a reasonable time allowed to members of the Commission generally for the examination of the report presented; and that thereafter the President shall call upon the Commission to discuss any report that may be ready for investigation.

"7. That one or more Committees may be appointed for the purpose of studying the reports referred to under Rules 4, 5, and 6, or any specific portion of them, when it is apparent that previous study by a limited number of delegates is necessary for arriving at a conclusion regarding any problem under consideration.

"8. That any Committee so appointed for the detailed study of a report, or section of a report, shall, upon the termination of its labors, report the result of its examination to the Commission in plenary session, whereupon a general discussion on the report of such Committee will be in order.

"9. That the number and constitution of Committees shall in every case be decided by the Commission in plenary session; but a Committee may complete its own organization.

"10. That the manner of forming Committee shall be as follows: Each delegation shall hand in the name of one of its members to the President, who from amongst them will proceed to nominate the number necessary to serve on any one Committee; any delegate who is not himself a member of a Committee may attend the sittings of such Committee without taking part in any of its proceedings.

"11. That all proposals submitted to the Commission shall be handed to the President (or Chairman of a Committee) in writing, and a copy supplied on request to each delegation.

"12. That the public shall not be admitted to the Commission, but that such information regarding the progress of the general proceedings as may be deemed expedient to make public shall be communicated to the Press by a Committee of three to be elected for that purpose.

"13. That the Minutes of the plenary sessions of the Commission shall give a succinct resumé of the deliberations, and that a proof copy shall be opportunely

form and open to discussion and debate. The United States government being the conveners of the Commission, the other delegations naturally looked to the American for a programme. It was decided that it should be in the shape of a series of resolutions. Such a programme [43] was drawn up by the American Delegation in informal consultation with several of the other delegations, and on

delivered to the members of the Commission; and the Minutes shall not be read at the beginning of a session unless specially called for. Each delegate, shall, however, have the right to request the insertion in full of his special declarations, according to the text delivered by him to the Secretary, and to make observations regarding the Minutes.

"14. That both English and French shall on principle be recognized as the languages to be used in the Commission, and that steps shall be taken to ensure that the deliverations be rendered, if necessary, and the Minutes recorded in both languages.

"15. That each delegation shall have the right to introduce a secretary of delegation to the meetings of the Commission, providing that such secretary holds a substantive post in his Government service. Exception to this rule may be made in the case of a delegation of a country having no Consular or Diplomatic representative in China; but under no circumstances will other than *bonâ fide* secretaries be admitted. The names of secretaries to delegations shall be formally reported to the Chair.

"16. That, except when otherwise decided by the Commission, the hours of meeting of the Commission shall be from 10.30 A. M. to 12.30 P. M., and from 2 to 5 P. M., on every day of the week except Saturday and Sunday."

[43] American Program:

"(1) That, whereas the reports submitted to the International Opium Commission by the delegations present recognize that opium, its alkaloids, derivatives and preparations are, or should be, confined to legitimate medical practice;

"Be it resolved, therefore, that in the judgment of the International Opium Commission a uniform effort should be made by the countries represented at once or in the near future to confine the use of opium, its alkaloids, derivatives and preparations to legitimate medical practice in their respective territories;

"And be it further resolved, that in the judgment of the International Opium Commission each government represented is best able to determine for its own nationals, dependent or protected peoples, what shall be regarded as legitimate medical practice.

"(2) That, whereas the reports submitted to the International Opium Com- governments confronted by them; and that they should be settled as soon as mission by the delegations present recognize that, as the result of inadequate knowledge in the past of the baneful effects of the unguarded and indiscriminate use of opium, alkaloids, derivatives and preparations, there have arisen certain revenue problems which depend upon the production, sale and use of opium, its alkaloids, derivatives and preparations;

the twenty-third of February it was submitted for discussion and amendment. It was clearly stated, on submission, that the American Delegates, after due consideration of the historical aspects of the opium question, after a complete and careful study of the literature on the general question of opium abuse throughout the world, and more particularly after a specific study of the various reports laid before the Commission in Pleno had considered and drawn up a series of resolutions which they hoped might receive, along with others of similar sense, the unanimous approval of the International Commission. In considering and drawing up the resolutions, the American Delegation had kept in mind the magnitude of the question they were instructed to review, and the relative values of the economic, moral and international interests of the different govern-

"And, further, whereas, in the judgment of the International Opium Commission these revenue problems remain and will require a certain time for solution;

"Be it resolved, therefore, that in the judgment of the International Opium Commission no government should, as a matter of principle or necessity, continue to depend upon the production of opium, its alkaloids, derivatives and preparations for an essential part of its revenue;

"And be it further resolved, that in the judgment of the International Opium Commission such revenue problems as exist are not of a nature to baffle the possible to the end that opium, its alkaloids, derivatives and preparations should be relegated to their proper use in legitimate medical practice.

"(3) That, whereas, the reports submitted to the International Opium Commission by the delegations present state that opium smoking is prohibited to tneir nationals; further, that some of the reports submitted state that opium smoking is prohibited to protected and dependent peoples of some of the governments here represented;

"Be it resolved, therefore, that in the judgment of the International Opium Commission, the principle of the total prohibition of the manufacture, distribution and use of smoking opium is the right principle to be applied to all people, both nationals and dependent or protected; and that no system for the manufacture, distribution or use of smoking opium should continue to exist, except for the express purpose and no other of stamping out the evil of opium smoking in the shortest possible time.

"(4) That, whereas, the reports submitted to the International Opium Commission by the delegations present, record that each government has strict laws which are aimed directly or indirectly to prevent the smuggling of opium, its alkaloids, derivatives and preparations into their respective territories;

"Be it resolved, therefore, that in the judgment of the International Opium Commission it is the duty of all countries which continue to produce opium, its alkaloids, derivatives and preparations, to prevent at ports of departure the ship-

ments represented in the Commission; though it was distinctly stated that in spite of the sympathy and interest which the American Delegation had for the difficulties, financial and other, they had concluded that the traffic in opium for other than necessary uses could not much longer continue, or there would still loom between the East and West a problem that in its magnitude and potentialities for strife would outstrip the magnitude and forces of the long since happily settled slavery question. It was pointed out that the American people were watching with admiration a repetition of history; that they saw the beginning of a determined, and they hoped a final effort of Great Britain and others to sacrifice a great revenue to the end that another widespread evil might cease. They showed their appreciation of the effort that Great Britain particularly was making, and the large

ment of opium, and of its alkaloids, derivatives and preparations, to any country which prohibits the entry of opium or of its alkaloids, derivatives and preparations.

"(5) That, whereas, the reports submitted to the International Opium Commission by the delegations present, indicate that the use of morphia, its salts and derivatives, is indissolubly bound up with the abuse of opium itself, and that their use accompanies, or sooner or later supervenes, on the use of opium itself;

"Be it resolved, therefore, that in the judgment of the International Opium Commission, strict international agreements are needed to control the trade in, and the present or possible future abuse of, morphia and its salts and derivatives, by the people of the governments represented in the International Opium Commission.

"(6) That, whereas, the reports submitted to the International Opium Commission by the delegations present indicate that though each government represented is best able by its national laws to control its own internal problem as regards the manufacture, importation or abuse of opium, its alkaloids, derivatives and preparations, yet that no government represented may by its national laws wholly solve its own opium problem without the conjoint aid of all those governments concerned in the production and manufacture of opium, its alkaloids, derivatives and preparations;

"Be it resolved, therefore, that in the judgment of the International Opium Commission a concerted effort should be made by the governments represented in the Commission to assist every other government in the solution of its opium problem."

"(7) Be it resolved, that, in the opinion of the International Opium Commission, every nation which effectively prohibits the production of opium and its derivatives in that country except for medical purposes should be free to prohibit the importation into its territories of opium or its derivatives except for medical purposes.

financial interests it involved; that the American people realized that, as in the slavery question so in the opium question, Great Britain was ready to sacrifice. It was pointed out that the American programme was presented more in the shape of a skeleton which it was hoped that the wisdom and thought of the other Delegations would be able to clothe.[44]

[44] The address of Mr. Hamilton Wright on submitting the American Program, of which the above text is a paraphrase, is given below:

Mr. President and Fellow Commissioners of the International Opium Commission: The American delegates, after due consideration of the historical aspects of the opium question, after a complete and careful study of the literature on the question of opium abuse throughout the world, and more particularly after a specific study of the various reports laid before this Commission, have considered and drawn up a series of resolutions which we hope may receive, along with others of similar sense, the unanimous approval of the International Opium Commission. We have, in considering and drawing up these resolutions, kept in mind the magnitude of the question we were instructed to review, and the relative values of the economic, moral, and international interests of the different governments represented in this Commission.

It may be remembered that in one of the early despatches which led to the calling of this Commission, our Secretary of State took the following ground: That the government of the United States had not actually engaged in the opium trade in the Far East; that it had from early days discouraged the trade in the Far East through treaties made with Far Eastern countries, and by statutes passed to make those treaties effective; that it had by special laws endeavored to prevent its citizens from pushing the trade on unprotected peoples. All this is a matter of record in our report. Our Secretary of State was of the opinion that, in view of the historical position of the United States, its government was, perhaps, best positioned to propose that there should be called together an international commission to study the scientific, moral, economic, political and all other sides of the opium question, and if possible for the Commission to suggest methods for its solution.

The American delegates can assure this International Opium Commission that our Secretary of State in calling for this Commission, sympathized with, and expressed the sympathy of the American people, for those countries which had become involved in a financial maze based on a too free production and traffic in opium. His mind and the mind of the American people was stirred by a profound sympathy for all people who have become involved in, and thus rendered less effective in world affairs by the abuse of opium. The American delegation had studied the opium problem in all of its phases, in the same spirit and with the same sympathy in which the International Opium Commission was conceived and finally brought into being. Mr. President, we feel certain that the other delegations to this International Commission have thought as deeply on the opium question as the American since we assembled at Shanghai; that they have

Without going into particulars as to the debate which led to the

thought as deeply, and with more real knowledge of the facts, as have thought that large number of able men and women who have agitated this opium question during the last fifty years; that they have thought as seriously and deeply as those statesmen will be bound to think to whom this Commission must leave the final adjustment of the problem.

You are all, I am sure, in cordial agreement with the American delegates that the opium problem is a difficult one, especially for China and India. We as well as the other delegates were gratified when, in opening on the Chinese report, Sir Alexander Hosie expressed his great appreciation of, and his sympathy for, the hardship that confronts the Chinese people and government in dealing with their opium problem. Our delegation would enlarge upon Sir Alexander Hosie's fine spirit by expressing our appreciation of, and our sympathy for, the great difficulties which we know confront the governments of British India, Hong Kong, the Straits Settlements, French Indo-China, Siam, Portugal and the Netherlands, in dealing with the serious financial problems which have supervened on their production and manufacture or their trade in or use of opium. We, however, are glad to be able to congratulate our German, Austrian and Italian colleagues that through the wisdom of their governments and the self-restraint of their peoples, their opium problem is not of a nature to be alarming. We rejoice also that the government of French Indo-China is so surely and steadily resolving its opium problem to final extinction.

Yet, Mr. President, in spite of the sympathy and interest which our delegation have for the difficulties, financial and other, we have concluded that the traffic in opium for other than necessary uses ought not much longer to continue, or there will still loom between the East and West a problem that in its magnitude and potentialities for strife outstrips the magnitude and forces of that long since happily settled slavery question. The slavery question agitated the civilized world for a century. No more emotion was expended, no greater misconception of facts occurred, no greater stubbornness of opinion was shown in the initial stage of the solution of that problem, than has been shown in the initial stages of the solution of this opium question. Before the slavery question was finally settled it well-nigh tore a continent in two. In the United States we were dominated for fifty years by discussions of the slavery question, which finally led to a horrid war, and that in spite of the great example set us by the British government in voluntarily freeing the slaves in her colonies, and in charging her imperial budget with a sum which may be said to be fifteen times the sum involved in the Indian opium traffic, the opium farms of Hong Kong, the Straits Settlements, Federated Malay States and Ceylon.

Mr. President, during the last few years our people have watched with admiration a repetition of history, for they have seen the beginning of a determined and they hope a final effort by that same great nation to sacrifice a large revenue to the end that another widespread evil may cease. In watching this historical day, the American people, besides cleaning its own house, have felt that the century old desire of China is about to be fulfilled. They believe that we live in a new day in which, were he alive, the great Warren Hastings would while

modification of the American programme, it may be stated that of

enunciating the great fundamental principles which filled his mind, say somewhat differently in the matter of foreign commerce in opium. They believe that he would say, and would be indorsed by the decent opinion of mankind, that opium was not a necessary of life, that it was undesirable to increase the production of any such article, that opium was a pernicious article when regarded as an article of luxury, an article which the wisdom of governments should carefully restrain from consumption, internally, and let us add, abroad. The day we are in is a modern and more happy day than the day of Warren Hastings. It is a day in which moves the force of another great Indian and Imperial statesman, a great philosopher also — Lord Morley. Lord Morley is not afraid to say that he did not "wish to speak in disparagement of the Royal Commission, but somehow or other its findings had failed to satisfy public opinion in this country, and to ease the consciences of those who had taken up the matter. * * * What was the value of medical views as to whether opium was a good thing or not, when we had the evidence of nations who knew opium at close quarters. That the Philippines Opium Commission in the passage of their report which he hoped the House of Commons would take to heart, declared that the United States so recognized the use of opium as an evil for which no financial gain could compensate, that she would not allow her citizens to encourage it, even passively."

Lord Morley could further express himself on three most important points:

"The first concerning his insistence that China must fulfil her part of the agreement founded on her own proposals, if England is to do the same. Lord Morley explained that from his point of view such insistence was intended, not as a threat to China, but rather as a help to her to hold fast to her obligations, and to go forward with their fulfilment.

"The second point concerned the action of our government (*i. e.* the British) in case China should fail to carry out her own proposals — was it to be understood that the present movement for the gradual extinction of the Indian opium export should, in that case, come to an end? Lord Morley did not see that that was implied. There were two broad grounds for the present movement; one, the proposals of the Chinese government, the other the resolution of the House of Commons on the 30th May, 1906. If the first should fail the second did not necessarily cease to be a ground of action.

"The third point concerned a possible plea on the part of China that the process of reduction might go on more swiftly than her own first proposals contemplated. Would Lord Morley be prepared to consider such a plea if deliberately put before him by the Chinese authorities? In reply Lord Morley said that he could only refer to his statement on the 30th May, 1906, that any deliberate proposals from the Chinese government on the subject of opium would meet with sympathetic consideration."

Mr. President, is Great Britain to halt? Our delegation, the American people, do not believe it. Great Britain will not halt if we are to credit her public opinion, her press, her present eminent Secretary of State for Indian affairs. The American people believe that Great Britain will defend herself against world-wide criticism by replacing her opium revenue, sacrificing it mayhap, and

by sacrificing dual agreements and obsolete treaties, as she sacrifices, and sends to the scrap heap an obsolete class of battleships that are of no further use to defend her extensive interests. We live in a day when such things may be done by our great Mother Country. We live in the day of large-minded governors-general and statesmen as Lord Minto who declares: "That there is no doubt throughout the civilized world a feeling of disgust at the demoralizing effect of the opium habit in excess. It is a feeling in which we cannot but share. We could not with any self-respect refuse to assist China on the ground of loss of revenue to India." And here let me express my admiration for the honorable member of the Indian government who sits in the British delegation, for placing this statement of Lord Minto's in the record of this International Opium Commission.

Mr. President, it is the day of such great lawyers and statesmen as Mr. Elihu Root, who could bring to life this International Opium Commission. It is the day of such practical churchmen and philanthropists as Bishop Brent, whose mind grasped the opportune moment for suggesting the calling of this Commission. It is a day when this troublesome opium question is no longer the concern of one or two powers, who have direct interests in the traffic and illicit use of opium. But a day when the great powers of the world who have kept aloof from the problem may join with those others and out of their experience, advise on this question. It is a day, let us hope, in which moves the old happy spirit that leaped at the discovery of opium as an anodyne for those irretrievable ills from which the human mind and frame may sametimes suffer. It is a day, we venture to hope, when opium shall by the voice of this International Opium Commission be relegated and consecrated to its proper use in relieving the really sick. The American delegates trust that it is a day when opium shall no longer be made to descend from its high place amongst the gifts of nature to pander to the careless desires or vices of mankind.

Mr. President and fellow Commissioners, through this more recent and more thorough study of the opium question, I have seen that the abuse of opium is a sad business. It was with a feeling not far from shame that it fell to my lot to place before this Commission the unhappy state of the opium question in the United States. I venture to place myself with those other gentlemen on the floor of this house who by their training are best able to judge of the mental and physical conditions that arise and ultimately call for the use of opium. We would agree that the need for opium often occurs. We know, as the great Sydenham said, that medicine would go limping had it not been for the discovery of that drug. We would agree, I think, that there is a constant temptation to the most enlightened members of the medical profession to resort to the use of opium to relieve mental and physical pain, a temptation to which the medical profession too often gives way; yet because I know these particular phases of the opium problem, all the more am I firmly convinced that opium in all of its forms is a drug to be honestly and simply used only in those stresses and strains of mental and physical life that may be said to be extreme.

With these thoughts in our minds, our delegation has had to face an international problem that earnestly calls for the study of questions of revenue, of treaties between various powers on the question of opium, of dual agreements of

the final resolutions,[45] numbers 4 and 9 are American and were accepted without material modification; numbers 2, 3, and 6 were compromise resolutions of the American and British delegations; numbers 1 and 5 were resolutions introduced by the British delegation and modified at the suggestion of the American delegation; and resolutions 7 and 8 were introduced by the Chinese delegation. Resolution 1 was a very necessary expression of sympathy with China in her fight against the production and consumption of opium. Resolution 2 was a frank recognition of the action taken by the government of China in suppressing the vice of opium smoking, and of other governments to the same end, and calls upon the governments for further action. Resolution 3 in spirit relegates opium to its proper use in medicine, but takes into consideration the difficulties to be encountered by the different governments in determining what legitimate medical practice may mean. It was recognized by the American delegation that the strict regulations that obtain in Western countries could not be made to apply to China and India where medical education is on a low plane, and where most morbid conditions are treated by household remedies, opium being in most common use. But the resolution is a practical condemnation of the illiberal use of opium even in India. Resolution 4 was the most important resolution passed. It recommends for adoption a new principle in international law. In presenting it the American delegation urged that the time had come for opium producing countries to control the export of their product to countries that prohibit its

the same nature for the control or reduction of the use of opium amongst those peoples to whom it is a familiar and ready remedy for all the minor ills that flesh and mind are heir to. There has at times been a temptation to look at the opium problem from the moral, the medical, the financial, or the historical point of view alone. But on the whole we may assert that we have resolved the opium problem in its most comprehensive sense; and that if we had any thought that it was a problem of easy solution without the conjoint action of the different governments here represented, we have been sobered. It is with strong convictions but in generous spirit that the American Opium Commission presents its resolutions with a hope that there shall speedily be recorded the first great international step in the solution of this vexatious question, so that the East and the West may be free without further conflict of opinion to proceed to discuss those other but minor problems that still agitate them.

[45] *Vide* SUPPLEMENT, *3*:275 (July, 1909).

ntry. It was pointed out that in our National Pure Food Law we had, without pressure from foreign governments and as a matter of courtesy placed the same penalties on a shipper of misbranded or adulterated foods and drugs abroad as on shippers in our interstate commerce, and that the time had come for an international recognition of the fact. It was urged further that in prohibiting the entry of opium into the Philippines and United States, the United States government was confronted by smuggling operations on a large scale, and that, in addition to sacrificing a considerable revenue, especially in the Philippines, it would be necessary to add considerably to the budget for a preventive service, if the prohibitory laws were to be made effective. It is to the great credit of all the delegations present that this principle was accepted without demur. To the British delegation especial appreciation is due, for it was realized in the Commission as a Whole that the resolution aimed at the export of crude opium from India and of opium manufactured for smoking from Hongkong, the Strait Settlements and British North Borneo. Resolution 5 aimed at the international control of the manufacture and distribution of morphia. The American delegation, as will be seen by referring to the original American Programme, had drawn up a strict resolution in regard to morphia; however, it was at once withdrawn as a concession to the British delegation, when it was found that they were to submit one of similar purport, except that it applied to China and Far Eastern countries alone. The British delegation accepted an amendment of the American, making their resolution international in application; and, as amended, it was passed unanimously. Resolution 8 aims at a striking evil that has supervened on the fight of China against opium smoking. For it was developed in the Commission that that country has been flooded with anti-opium remedies containing high percentages of morphine and opium, and that the cure threatens to become worse than the disease. Chemists of all nationalities in the settlements and concessions in China have manufactured these anti-opium remedies by the ton, and the well-meaning but gullible Chinese *habitués* have given up opium smoking in their favor —few of them realizing that

they are taking opium in another form. No doubt many other Chinese who can not stand the odium now attached to opium smoking, secure and use these remedies secretly. Resolution 6 must be considered an unfortunate one. It was precipitated by an attempt on the part of the American delegation to have the scientific and medical aspects of the use of opium thoroughly investigated. But the British delegation took the ground that the Commission was not constituted in such a manner as to permit the investigation from the scientific point of view of anti-opium remedies and of the properties and effects of opium and its products. That, too, in spite of of the fact that there were several experts in the Commission. It was urged by the American delegation that the time was ripe for a fresh utterance on this side of the opium question; that the Royal Commission of 1895 had but one medical expert; that his report had colored to a great extent the final judgment of the Royal Commission; that on the other hand that expert's opinion had not proved to be satisfactory to the great majority of scientists who had examined it in detail, and that if one expert was enough for a Royal Commission, two or three should be warrant for action by the International Commission. The American delegation was strongly supported in this view by the Japanese, the German, the Chinese and other delegations; but it was lost by a majority vote of one. Resolution 7 was necessary as a reminder that the opium dens in the foreign concessions and settlements in China had not all been closed. Some were still open in the French and the international settlements of Shanghai and in the French and Japanese concessions in other parts of China. Resolution 9 calls for the application of the pharmacy laws of Western powers to their subjects in the consular districts, concessions and settlements in China. As matters stand at present, it is within the power of anyone calling himself a physician to prescribe opium, morphine, etc., in any quantity he pleases to those who apply to him, and has led to a widespread use of the internal administration of opium to combat or displace the smoking habit. Of course it will be recognized that these resolutions were simply declarations based on a study of the opium problem by the Commission as a Whole,

and have no force as international law, and will have no force except as they affect public opinion until they are conventionalized in an international pact. Undoubtedly, this will be the next and final step in placing the entire production, manufacture and trade in opium under an international convention. Considering what an inflammable subject the opium question has been for a hundred years or more, it was remarkable and greatly to the credit of all Powers represented that the Commission succeeded in achieving results without a display of feeling. The delegations realized their responsibility, and that disagreement on the part of the Commission would throw the whole subject of opium open to a further emotional discussion. Most happily this was avoided. In calling for thorough reports on the opium question not only of the Far East, but of the entire world, and in placing it on a scientific basis where statesmen may deal with it, the opium problem is near its final solution.

Some of the most important points gained by the calling of the Commission has been the willingness of China to consult with countries like Persia and Siam on her opium question, though with these countries she has no treaty relations. Again the question has been elevated from the narrow confines of dual agreements and treaties to a plane where every civilized nation may have a voice in its final settlement. One more question is before the world at large for final adjustment. In its broader effects, it impressed China — both government and people — with the fact that the Western powers deeply sympathize in her effort to suppress an evil which undoubtedly lies at the bottom of her past inertia. It has shown that the Western powers may consult on her territory on a problem which affects her relations to them, act in her interest and not demand a *quid pro quo*. It has taught her that an international commission can meet on her territory, interest themselves in her welfare and break up without demanding a province or an indemnity. It has done more than the remission of the Boxer indemnity to impress on the Chinese that the American government and people are sincerely friendly. The remission of the Boxer indemnity appealed to the official and educated classes as a generous act, but no more than was due; while the work of the International Opium Commis-

sion and the leadership of the United States in it has penetrated not alone the upper classes, but into the humblest hovel in China.[46]

HAMILTON WRIGHT.

[46] In this (October) SUPPLEMENT will be found several treaties in addition to those appearing in the previous (July) SUPPLEMENT.

The author also desires to add that, on looking further into the subject, and after re-reading Mr. Reed's letter that appeared in the SUPPLEMENT (p. 269), to the July number of the JOURNAL, the statements made on page 641 of the JOURNAL (July) in reference to Americans not engaging in the opium trade after the negotiation of the Treaty of Wang Hea of 1844 must be modified. It seems certain that the Treaty of Wang Hea did not drive Americans from the opium trade. This was largely due to the connivance of Chinese port authorities with the traders. Had the Chinese government attempted to effectuate the opium aritcle of the Treaty of Wang Hea by dealing with American opium traders under its own laws, these traders would not have received either countenance or protection from the United States.

THE RELATION OF THE CITIZEN DOMICILED IN A FOREIGN COUNTRY TO HIS HOME GOVERNMENT

When the thirteen colonies became a nation and formed the Constitution of the United States of America, their population was chiefly on the Atlantic seaboard. Their ships sailed to every port of the civilized world. They were alive to the importance of foreign commerce. The wars of the Napoleonic epoch and the controversies to which they gave rise, led the American people to feel that it was for their interest, not only to abstain from entangling alliances with the powers of continental Europe, but to limit their activities as far as possible to their own territory. The acquisition of Louisiana from the French in 1803 gave to the United States a fertile and almost boundless domain and afforded an opening for national growth, which of itself tended to withdraw the thought and enterprise of our people from foreign business. Undoubtedly our foreign commerce did increase down to the time of the Civil War, but it did not keep pace with the development of the country or with the growth of interstate commerce. Since the Civil War, however, the current has turned. The wealth of the United States has enormously increased. Its capital is found invested in foreign countries, and it has acquired territorial possessions not only in the Atlantic, but in the Pacific, which have changed entirely the attitude of the American people. It must inevitably be the case that in the future the number of American citizens who go to foreign countries and take up a residence there will far exceed that of any other period of our history. A few of these no doubt will become citizens of the countries to which they go, but experience shows that the great majority both of English and American citizens who reside in foreign countries still retain their citizenship. The relation borne by the home government to these citizens domiciled abroad is, therefore, a matter of great and increasing importance.

We will not attempt in this paper to deal with the subject of

expatriation, nor with the relation to those who have expatriated themselves from the government of their origin.

We will consider:

First: The obligations of citizens domiciled abroad to the home government.

Second: The duties of the home government to citizens domiciled in foreign countries.

The obligations of citizens domiciled abroad to the home government.

These citizens have not renounced allegiance. They are still subject to the laws of their native country so far as these laws relate to them. It is true that legislation is presumed to relate only to transactions done within the territory over which the legislature has general jurisdiction. It is also true that in general the validity of an act done or contract made is to be determined by the law of the place where it is done, unless the contract is executory and to be performed elsewhere. In the latter case the law of the place of performance usually governs. But no court is bound to enforce a contract to do something which is considered by the jurisprudence of the forum to be intrinsically wicked (*malum in se*) nor a contract the enforcement of which is prohibited by the law of the forum (*malum prohibitum*).[1]

In whatever form questions come before the court of any country the policy of that country, as declared by its legislature, must furnish the rule for decision. Even where no legislation had declared this policy the Supreme Court of the United States has sometimes recognized and enforced rules of policy established by previous decisions, and held that they should determine the consequences of acts done on foreign vessels and in a foreign country. In the leading case of *The Montana*[2] a bill of lading was executed and delivered in New York by which the owner of a British ship contracted to transport goods to Liverpool. The freight was payable there in British currency. A negligent act of the master committed on the Irish sea caused a shipwreck on the British coast. The court held that the well-established

[1] Minor: Conflict of Law, 9; *Green* v. *Van Buskirk*, 5 Wall. 307, 312.

[2] Reported *sub nom. Liverpool and G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

policy of American law was to treat as invalid clauses purporting to exempt the carrier from responsibility for damage caused by the negligence of the master. It was therefore held that the carrier was responsible, although the clause was valid by British law.

It is an essential element of sovereignty to determine the rule of decision for all controversies that come before its courts for judgment. In accordance with this prerogative *The Montana* was decided. And the whole course of American legislation and judicial decision is to the same effect.

From the foundation of the government Congress has exercised the right to regulate the acts of citizens of the United States, and attach certain prescribed consequences to those acts, although they were done in foreign countries. This is entirely in accordance with well-settled principles of international law. "A state has the right to attach whatever significance it will within its own territory to acts of its subjects, wherever those acts may be done." [3]

1. In 1799 it was enacted as follows:

" Every citizen of the United States whether actually resident or abiding within the same " who carries on correspondence with a foreign country " with intent to influence its action in any controversy with the United States, or to defeat the measures of the government of the United States," shall be punished by fine and imprisonment.[4]

Contemporary history shows that this act was passed because American citizens residing abroad were actually plotting to defeat the measures of the government.

2. In the following year it was enacted by Congress that no citizen of the United States should directly or indirectly hold or have any property in a vessel engaged in " carrying slaves from one foreign country or place to another." [5]

In 1808 an act was passed prohibiting citizens of the United States

[3] Hall: International Law, 5th ed., 49; 1 Oppenheim: Inter. Law, 195; Wharton: Criminal Law, secs. 271, 278, 279; *Rex* v. *Sawyer*, 2 Carr. & K. 100, decided by the twelve judges on questions reserved; *Commonwealth* v. *Smith*, 11 Allen 243; *State* v. *Grady*, 54 Conn. 118.

[4] Act of Jan. 30, 1799, 1 Stat. 613; re-enacted sec. 5335, Rev. Stat.; sec. 5, U. S. Penal Code, March 4, 1909.

[5] Act of May 10, 1800, 2 Stat. at L. 70; re-enacted sec. 5556, Comp. Stat.

" from taking on board, receiving or transporting any negro from any of the coasts of kingdoms of Africa." [6]

Indictments under these statutes against the slave trade were found and punishments were inflicted. Gordon, a citizen of the United States, was hanged for piracy committed in taking negroes from the coast of Africa.[7]

Similar legislation was adopted by the British Parliament. The two countries were equally determined to suppress the African slave trade, even where it was carried on in places outside their respective territory.[8]

3. In 1893 Congress passed the law known as the Harter Act, which regulates the form of bills of lading issued in foreign countries for the transportation in foreign vessels of cargoes to the United States and prohibits the insertion of certain clauses in such bills of lading. The validity of this statute and its applicability to commerce originating in foreign countries has frequently been sustained by the Supreme Court.[9]

4. At a very early date (1795) the right of the United States government to take jurisdiction over American citizens engaged in the violation upon the high seas of the neutrality existing between the United States and foreign governments was sustained.[10]

In this case an American citizen joined with French citizens who had a French letter of marque, in seizing and bringing into Charleston a Dutch vessel. France was at that time at war with Holland. It was held in the Circuit Court by Mr. Justice Wilson that the act of the American citizen in joining with the French citizen in making the seizure, vitiated the capture and that the vessel should be restored to the Dutch owner. The decree was affirmed by the Supreme Court.

As the facilities of intercourse between nations increase, and the importance of co-operation between them in regulating the conduct

[6] Act of April 20, 1808, 3 Stat. at L. 450, sec. 4.

[7] *U. S.* v. *Gordon*, 5 Blatchfield 18; *Slavers* (*Kate*), 2 Wallace 350.

[8] *Santos* v. *Illidge*, 8 C. B. (N. S.) 861.

[9] The *Carib Prince*, 170 U. S. 655; The *Sylvia*, 171 U. S. 463; The *Chattahoochee*, 173 U. S. 540.

[10] *Talbot* v. *Janson*, 3 Dallas 133.

of each other's citizens is recognized, no doubt it will come to pass that this regulation will be affected by conventions and treaties. A notable instance of such regulation is to be found in the International Opium Commission, treated of in the July number of this periodical, p. 648 *et seq.*, SUPPLEMENT, pp. 253–276.

The establishment of the International Court of Arbitration at The Hague was an important step in the same direction. The usefulness of this court was greatly increased by the convention for the pacific settlement of international disputes adopted at The Hague in October, 1907.[11]

In what has thus been said it has been assumed that the authority of the United States government is as adequate and as extensive in dealing with its citizens in foreign countries as that of any other nation. In a country which is subject to the authority of a written constitution it is always necessary to examine the text of that constitution for the purpose of ascertaining whether or not a particular power claimed for the government is granted by that instrument, expressly or by necessary implication. A brief reference to this instrument is therefore needful.

The Constitution of the United States gives to Congress the power to regulate commerce with foreign nations. In *Gibbons* v. *Ogden*[12] it was said by Chief Justice Marshall, delivering the judgment of the court,

> It has, we believe, been universally admitted that these words apprehend every species of commercial intercourse between the United States and foreign nations.

Again at page 197, the great Chief Justice said:

> The sovereignty of Congress, though limited as to specified objects, is plenary as to those objects.

In a later case[13] these words are quoted with approval and the court adds:

> The power does not stop at the jurisdictional limits of the several states. It would be a very useless power if it could not pass those lines.

[11] American Journal of International Law, 2:29–43.

[12] 9 Wheaton 1, 193.

[13] *U. S.* v. *Holliday*, 3 Wallace 407, 417.

As was justly said by Mr. Root in his annual address before the American Society of International Law:[14] "In international affairs there are no states."

The states are prohibited expressly from making treaties with foreign governments.[15] It is obvious therefore that the whole jurisdiction over foreign commerce of every sort is committed to Congress, and that the President, whose duty it is to execute the laws, has plenary power to enforce those which Congress may enact upon this subject.

In what has been said it is not intended to imply that a citizen of one nation, domiciled in another, owes nothing to the country of his residence, or is not for many purposes, and to a large extent, subject to its laws. But it is well settled that he must do nothing inconsistent with his native allegiance or be found in hostility to his native country.[16]

The duties of the home government to citizens domiciled in foreign countries.

Protection and allegiance, it has been said, are reciprocal. The uniform practice of the United States and of Great Britain, as well as of other civilized countries, has been to extend a protecting arm over their citizens in foreign countries. This is indeed a necessary incident to the comity of nations.

As a rule civilized nations allow the citizens of other countries to cross their borders, to establish a domicile therein, and to do business in this domicile. In most countries the principal difference between the legal rights of domiciled aliens and those of citizens, consists in political rights — suffrage and the like — and in the right to hold real estate. By the common law of England aliens could not own

[14] American Journal Int. Law, *1*:278.

[15] U. S. Constitution, art. 1, sec. 10.

[16] 1 Kent Comm. 76; The *Emanuel*, 1 C. Rob. 296, 302; Pothier, "Traité du droit de propriété," p. 94 (ed. 1776): "Le domicile ne lui fait pas perdre la qualité de sujet du Roi qu'il a acquise par sa naissance, et ne lui dispense pas des Lois du Royaume, qui ne permettront pas aux sujets du Roi, de servir en temps de guerre, aucune Puissance étrangère, sans une expresse permission du Roi." Code Pénal pour la France, etc., sec. 78, is similar to the law of 1799, before quoted.

real estate within the United Kingdom. The same rule prevails in many states of the American Republic and in many other countries. These rights no alien can claim. On the other hand, partly by treaties and partly by comity without express treaty, all the other rights that citizens of a particular country possess are conceded to aliens domiciled therein.

For example, the treaty with Prussia, negotiated in 1785, by Adams, Franklin and Jefferson, gives to Prussian citizens the right to reside and trade in the United States. They shall pay no other or greater charges, fees or duties than citizens of the most favored nations. Article VI contains an agreement that goods loaded on their ships shall be examined before loading, and not after, except in case of fraud. Vessels of one country may enter the ports of the other without being obliged to break bulk (article VIII). "The antient and barbarous right to wrecks of the sea shall be entirely abolished" (article IX). "The most perfect freedom of conscience and of worship is granted to the citizens or subjects of either party within the jurisdiction of the other" (article XI).[17]

The treaty with Spain, negotiated by Pinckney in 1795, contains the following clause (article VII):

> The citizens and subjects of both parties shall be allowed to employ such advocates, solicitors, notaries, agents and factors, as they may judge proper, in all their affairs and in all their trials at law, in which they may be concerned, before the tribunals of the other party, and such agents shall have free access to be present at the proceedings in such causes, and at the taking of all examinations and evidence which may be exhibited in the said trial.[18]

An examination of the various treaties negotiated by the United States with foreign powers, from the early days of American diplomacy to which reference has already been had, to the present time, will show diligence on the part of the United States to procure for its citizens who desire to reside and do business in foreign countries, security in their persons, business and freedom of worship. Obviously, these treaties devolve upon the home government the right and

[17] United States Treaties and Conventions, Ed. 1889, pp. 899–902.
[18] *Ibid*, 1008.

the duty to obtain for their citizens domiciled abroad the full exercise of the rights thus guaranteed.

If the rights which have been conceded to the American citizen by such treaties or by comity should be infringed by the foreign government, under the jurisdiction of which he resides, a question of great importance arises. To what extent should the government of which he is a citizen intervene for the protection of the rights which are alleged to have been infringed? On the one hand it is often said that a citizen of one country who takes up his domicile in another submits himself thereby to the jurisdiction of its courts and of its constituted authorities. To some extent this is true. But it is only half the truth. Like all half truths it is misleading. The science of law, like every other science, should be based upon all ascertainable facts. One of these facts is that in all countries there exists among certain classes a prejudice against aliens. This prejudice will affect the local authorities. At times the populace may be stirred up to infringe the rights of resident aliens and the local authorities may, for various reasons, be disinclined to interfere. In any country where the local government is not well organized, where either it is subject at times to control of mobs, or being unstable in itself can not be relied upon to enforce with any regularity or stability the rights of non-residents, the home government is the only authority that can intervene to protect the rights which have either been created by treaty, or given without the formality of a treaty by the consent and acquiescence of the local government.

This will appear more clearly when we recall the fundamental basis of international law. By the common consent of all nations certain principles of right have been recognized and established. Each country claims these rights for its citizens domiciled abroad. They constitute a code which is binding on the several members of the family of civilized nations. There is no central authority which has power to vindicate and enforce these rights. When they are infringed and remonstrance is unavailing, the only remedy is interference by the home government.

The rule on this subject is well stated by Oppenheim:[19]

[19] 1 International Law, 183.

The right of protection over its citizens abroad, which a state holds, may cause an intervention by right, to which the other party is legally bound to submit.

1. This principle has frequently been applied by the American State Department.

The rule is thus stated by Secretary Bayard: [20]

Oppression of a citizen of the United States by a Mexican customs officer is a subject for diplomatic intervention, and the party injured is not confined to a judicial remedy.

It is thus stated by Secretary Fish: [21]

When there is a denial of justice in Canada in a particular case of wrong inflicted in Canada on citizens of the United States, the case is one for diplomatic intervention.

In 1887 Secretary Bayard wrote to Mr. Merrill:

American citizens must be protected in their persons and property by the representatives of their country's law and power, and no internal discord must be suffered to impair them.[22]

In short, as Mr. Fiske, in his review of our early history, justly said: "A government touches the lowest point of ignominy when it confesses an inability to protect the lives and property of its citizens." [23]

2. A notable precedent for interference in such cases is that of *The Black Warrior*. That vessel was engaged in trade between New York and New Orleans, stopping at Havana each way. The practice had grown up of omitting to report to the custom authorities at Havana any cargo shipped at New Orleans and destined for New York. It appeared that this was a technical breach of the Spanish customs law. For this technical breach *The Black Warrior* and her cargo were

[20] Dispatch to Minister to Mexico, July 20, 1885, 2 Wharton Dig. 645; see treatment of cases Turkish outrages, *ibid*, 637, 638, 646, 647. See also Secretary Seward to Minister to Brazil, December 7, 1867, *ibid*, 615; Secretary Evarts to Minister to Argentine Republic, September 4, 1879, *ibid*, 625; Secretary Gallatin to Mr. Price, Feb. 11, 1824, 2 Gallatin Writings, 278.

[21] *Ibid*, 617, dispatch to Sir Edward Thornton, Sept. 4, 1873.

[22] Foreign Relations of U. S. 1894, p. 1167.

[23] John Fiske: Critical Period of American History, p. 761.

seized by the customs authorities of the Port of Havana. The United States government remonstrated vigorously and maintained that it was a violation of the rights of American citizens to enforce such an unreasonable, technical rule in cases where there was no actual injury to the Spanish revenue. The United States therefore insisted upon the release of *The Black Warrior* and her cargo. This release was finally conceded by the Spanish government.[24]

3. One of the most notable instances of interference by the United States for the protection of their own citizens was against the Barbary States. During the seventeenth and eighteenth centuries the powers of Europe allowed their commerce to be preyed upon by the cruisers of the Barbary States and submitted to pay tribute for the ransom of their citizens who were taken captives by these pirates. There was an order of priests called the Mathurins, "the object of whose institution is the begging of alms for the redemption of captives. They have agents residing in the Barbary States, who are constantly employed in searching and contracting for the captives of their own nation, and they redeem at a lower price than any other people can." [25]

This statement is contained in a letter from Jefferson written when he was the Minister for the Confederation at the French court.

At this time the Confederation thought itself too weak to protect our citizens abroad. Jefferson endeavored to convince the home office that the payment of tribute was a disgraceful alternative, to which even a weak people should not submit.

As early as January 12, 1785, he writes to General Greene:

> When this idea (tribute to the Algerians) comes across my mind, all faculties are absolutely suspended between indignation and impotence.[26]

When Jefferson became President he determined to act upon the judgment he had formed when our minister at Paris, and in 1803 sent a squadron of seven vessels to the Mediterranean. The result

[24] Latané: Diplomatic Relations United States and Spanish America, 132; Foster: Century of American Diplomacy, 343.

[25] Jefferson's works, edition of 1854, vol. XI, p. 93.

[26] Jefferson's works, Ford's ed., vol. IV, p. 25.

of our previous submission is well stated by Commodore Rogers in a letter to the Secretary of the Navy: [27]

> All the Barbary States, except Algiers, appear to have a disposition to quarrel with us unless we tamely submit to any propositions they may choose to make. Their demands will increase and be such as our government ought not to comply with.

These demands continued and brought on the war with Tripoli in 1804. To this war we sent a fleet of twenty vessels. Commodore Preble bombarded the city of Tripoli. Later in the year William Eaton was appointed our naval agent in the Mediterranean, and made an agreement with Hamet, the elder, brother of the Bashaw of Tripoli, by which Hamet agreed to furnish an army, and the United States "to supply cash, ammunition, and provisions," for a land attack.[28]

Eaton was accompanied by an American lieutenant of the navy and two American midshipmen. He and Hamet got together a small force of five or six hundred men, who marched across the desert to Derne, which was the most important city of Tripoli on the east. They there met two vessels of the United States Navy, who bombarded the citadel, the place was taken by storm, and the American flag hoisted upon its walls.

The result of these operations was an honorable and successful peace. The representatives of the European powers residing in Tripoli said: "No other nation has ever negotiated with the present Dey on such honorable terms." [29] The Pope declared that "America had done more for Christendom against the barbarians than all the powers of Europe united." [30]

Sir Alexander Bell, the admiral in command of the British fleet in the Mediterranean, wrote to Commodore Preble:

> You have done well in not purchasing a peace with money. A few brave men have been sacrificed, but they could not have fallen in a better cause.[31]

[27] Frost's "Book of the Navy," p. 97.

[28] A full account of this expedition is given in Pres. Jefferson's message, Jan. 13, 1806, Jefferson's works, vol. VIII, p. 54.

[29] Maclay's "History of the Navy," vol. 1, p. 302.

[30] Cooper's "Naval History of the United States," vol. II, pp. 79, 80.

[31] Frost's "Book of the Navy," p. 110.

Jefferson himself, appreciating the great importance and value of what our navy had done, writes to Judge Tyler, March 29, 1805:

> There is reason to think the example we have set begins already to work on the disposition of the powers of Europe to emancipate themselves from that degrading yoke. Should we produce such a revolution there, we shall be amply rewarded for what we have done.[32]

4. In 1860 there was a similar interference by the French government. French citizens had become domiciled in Syria. There were massacres by the Turks of native Christians in which French citizens had been killed or their property had been destroyed. Remonstrance failed to obtain redress. The French government sent a fleet and six thousand troops to Beirut. The redress which diplomacy had failed to obtain was immediately conceded. French citizens, domiciled in Syria, have since been secure.

5. Again in 1894 marines from the United States cruiser *Marblehead*, were sent ashore at Bluefields, to protect our citizens there.[33]

6. The principle upon which the United States intervene on behalf of their citizens is well stated in the diplomatic representations made by the United States in the case of Franklin Coombs and others, who accompanied an expedition sent by the then Republic of Texas in 1841 to Santa Fe in Mexico. The expedition was captured by the Mexicans. Some of those engaged in it were Americans citizens and it was alleged that they were being treated with great cruelty. The Republic of Mexico claimed that the expedition was in fact a hostile invasion of Mexico. In the dispatch sent by Daniel Webster, who was then Secretary of State, to Mr. Thompson, our minister to Mexico, he argues that these American citizens followed the march of the Texan expedition without taking part in its military activities, and that therefore they could not be treated as prisoners of war. But he insisted that if, in case of war between two neighboring states,

> the killing, enslaving or cruel treating of prisoners should be indulged in, the United States would feel it to be their duty, as well as their right, to remonstrate and to interfere against such a departure from the principles of humanity and civilization. These principles are common

[32] Jefferson's works, edition of 1854, vol. IV, p. 574.

[33] Foreign Relations United States, 1894, App. I, p. 303.

principles, essential alike to the welfare of all nations and in the preservation of which all nations have therefore, rights and interests. But their duty to interfere becomes imperative in cases affecting their own citizens.[34]

7. In the protection thus given by the United States to its citizens in foreign countries the executive has had the full support of Congress. In 1896 a concurrent resolution was adopted by both Houses that they

> will support the President in the most vigorous action he may take for the protection and security of American citizens in Turkey and to obtain redress for injuries committed upon the persons or property of such citizens.[35]

8. The practice which this government, as has been shown, had pursued from an early period, was recognized and formulated by statute in 1868:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.[36]

No doubt one reason for the enactment of this statute was the controversy that had arisen between the United States and some other countries in reference to the right of expatriation. Troublesome questions concerning this have often been presented to the Department of State. An alien has come to this country, become naturalized, and then returned to the country of his birth and taken up his residence there. Sometimes it has been reasonable to suppose that this was done for the purpose of evading military service. The practice of this government in such cases has been on the one side to insist

[34] Dispatch, April 15, 1842; Webster's Works (Ed. 1851), vol. VI, p. 437.
[35] U. S. Stat., First Session 54th Cong., concurrent resolutions, pp. 3, 4.
[36] Act July 27, 1868, c. 249, 15 U. S. Stat. 224.

upon the right of the naturalized alien to claim the benefit of American citizenship, and on the other to avoid the mischief of permitting this right of naturalization to be used as a cloak for fraud. As long ago as 1859 the Attorney-General of the United States gave the following opinion:

> In regard to the protection of our citizens in their rights at home and abroad, we have no law which divides them into classes or makes any difference whatever between them. A native and a naturalized American may therefore go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born.[37]

The language of the statute already quoted shows that it was not the intention of the legislature to authorize the President to declare war against the offending foreign country. This indeed, under the Constitution, the President has no right to do without the authority of Congress. But it is a well settled doctrine of international law that an intervention, such for example, as that of the landing of the marines at Bluefields before mentioned, is not an act of war. Sometimes a government, without declaring war, has taken possession of a port and collected revenue there until indemnity for past injuries has been obtained and the cost of occupation has been reimbursed.

On this subject Vattel says:

> Whenever a sovereign can by way of reprisals procure a just recompense or a proper satisfaction, he ought to make use of this method, which is less violent and less fatal than war.[38]

Our great American authority, Wheaton, quotes Vattel as to reprisals with approval and uses the following language:

> If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former and apply it to its own advantage till it obtains payment of what is due, with interest and damages, or keep it as a pledge till the offending nation has made ample satisfaction.[39]

[37] Right of expatriation, 9 Opinions Atty.-General 360; Foreign domiciled citizenship, (1873), 14 *ibid*, 295.

[38] Vattel's "Law of Nations," book II, chap. XVIII.

[39] Wheaton's "International Law," part IV, chap. I, sec. 3, pp. 509, 510, second edition by Lawrence.

9. The treatment of this subject will not be complete without some reference to the doctrine of extraterritoriality. In Turkey, in China, and in some other countries, local conditions have been such that foreign governments have claimed and obtained an agreement from the local government that controversies between resident aliens and citizens of the government having general jurisdiction over the place of residence shall be vested in consular courts. There are such courts at Shanghai, at Alexandria and in other places. The origin of these conditions is ancient. When the Turks conquered Constantinople, they found that the Genoese community in that city had obtained from the Christian Emperor concessions which recognized their right to be governed by Genoese law and to be judged by judges of their own selection. The conquering Sultan continued these rights to the Genoese. The French and other nations subsequently obtained similar concessions. The treaty of 1830, which was the first negotiated between the United States and Turkey, extended to American citizens the same privileges. It was agreed that they should not be treated in any way contrary to established usage, and that they should be tried, in case of criminal charges, by their own minister or consul, "following in this respect the usage observed towards other Franks." [40]

The Protocol of 1874, after referring to the law which had given to foreigners the right to hold real estate, provides as follows:

> The law granting foreigners the right of holding real estate does not interfere with the immunities specified by the treaties and which will continue to protect the persons and the property of foreigners who may become owners of real estate.

The Act of Congress of June 22, 1860,[41] confers upon our ministers and consuls in Turkey judicial authority

> for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey or its usages in its intercourse with the Franks or other foreign Christian nations.[42]

[40] U. S. Treaties and Conventions, pp. 824–826.

[41] 12 U. S. Statutes 72; U. S. Rev. Stat. 4125.

[42] In the case of *Ross* v. *McIntyre*, (140 U. S. 585) the Supreme Court of the U. S. states the position which our consuls in Turkey occupy under these laws and treaties, and gives with great clearness the reason for the law upon that subject.

Thus has the author endeavored to outline the relation of the home government to its citizens domiciled abroad, as it appears in statutes, treaties, diplomatic documents and decisions of the United States Supreme Court. It has been impossible within the limits of this article to set them forth more fully, but it is believed that what has been said will aid the student in arriving at a correct conclusion, not only as to the existing law, but as to the honorable traditions of the Department of State of the United States.

EVERETT P. WHEELER.

FORTIFICATION AT PANAMA

In the very able paper appearing in a previous issue of this JOURNAL,[1] discussing the question of whether the United States should or should not fortify the Panama Canal, the writer states his conclusion that we are legally and morally bound to abstain from fortifying, that the advantages which fortifications might give are more than offset by their disadvantages, and, irrespective of the question of legality, it is bad public policy and strategy to fortify.

Under the caption adopted for this paper it is proposed to discuss the subject under three headings, as follows:

First. The American policy as respects control and protection.

Second. The international and moral obligations restraining us.

Third. The expediency of defending the waterway by forcible means.

The American policy as respects control, protection, and fortification

In a special message to Congress, May 5, 1856, President Pierce, referring to an interruption of the isthmian transit via Panama and Nicaragua, remarked:

> It would be difficult to suggest a single object of interest, external or internal, more important to the United States than the maintenance of the communication by land and sea, between the Atlantic and Pacific states and territories of the Union. It is a material element of the national integrity and sovereignty.

In his first message to Congress, December 8, 1857, President Buchanan, referring to a recent interruption of traffic by the Panama railway, said:

> The isthmus of Central America including that of Panama is the great highway between the Atlantic and Pacific over which a large part of the commerce of the world is destined to pass. The United States is more deeply interested than any other nation in preserving the freedom and security of all the communications across the isthmus. It is our duty, therefore, to take care that they shall not be interrupted. * * *

[1] *3*:354, (April, 1909).

I recommend to Congress the passage of an act authorizing the President in case of necessity, to employ the land and naval forces of the United States to carry into effect the guarantee of neutrality and protection,

which the United States had undertaken by the treaty with New Granada of 1846.

On March 8, 1880, President Hayes, in transmitting a report of the secretary of state to the senate, and in response to its request for the views of the president touching our canal policy, stated:

With respect to the construction of an interoceanic canal by any route across the American isthmus, the policy of this country is a canal under American control. The United States can not consent to the surrender of this control to any European power or to any combination of European powers. * * * It is the right and duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus as will protect our national interests.

Ex-President Grant in writing for the *North American Review* in February, 1881, stated in a single sentence the American policy respecting an interoceanic canal:

In accordance with the early and later policy of the government, in obedience to the often expressed will of the American people, with a due regard to our national dignity and power, and with a watchful care for the safety and prosperity of our interests and industries on this continent, and with a determination to guard against even the first approach of rival powers, whether friendly or hostile, on these shores, I commend an American canal, on American soil, to the American people.

The Clayton-Bulwer treaty provided for an international guarantee and protection of any means of interoceanic communication that might be made in Central America or at the isthmus. While the French were preparing for beginning the work of canal digging at Panama, and a danger was looming up, public opinion would not tolerate the idea that we were to remain silent, or to share control with any European power of an American canal on American soil.

President Arthur said to Congress in 1881:

This government learned that Columbia had proposed to the European powers to join in a guarantee of the proposed Panama canal — a guarantee which would be in direct contravention of our obligation as the sole guarantor of the integrity of Colombian territory, and of the neutrality of the canal itself. My lamented predecessor felt it his duty to lay before the European powers the reasons which make the prior guarantee of the

United States indispensable, and for which the interjection of any foreign guarantee might be regarded as a superfluous and unfriendly act.

The United States looked on with complaisance at the futile efforts of the French to open the water way at Panama, but did not fail to warn Colombia that she had exceeded her power when she granted authority to a private company to open the route and fix the tolls without consulting the United States, the sole protector under the treaty with New Granada of 1846, of any means of isthmian transit that might be made effective. He also reminded Colombia before the work was actively undertaken by De Lesseps that the provision in the Wyse-Salgar contract providing for the free use of the canal by the government and citizens of Colombia and for uniform charges for the use of the canal by the shipping of all other nations was in conflict with the terms of our treaty of 1846, with that republic, wherein it was expressed that the United States, in its use of any canal across Colombian territory should enjoy all the rights, privileges, and immunities that Colombia enjoyed. Had the French succeeded we would have been obliged in self interest to have it in our power to effectively guard and protect the waterway.

These negotiations of 1881 resulted in the Trescott-Santo Domingo protocol of February 17, 1881, whereby the equality of rights of use by the sovereign and the United States was definitely reiterated, but it was also provided (*a*) that the two governments would select points on the isthmus deemed proper for fortifications temporary or permanent, for military or naval depots, coaling stations, and dockyards, and provide for their establishment and joint occupation; (*b*) that in any modification of the canal tolls or charges proposed by the canal company, the United States and Colombia should act in concurrence; (*c*) that the canal should not be considered open in time of peace to the war vessels of any nation except those of the United States and Colombia; but that they will declare the canal open to the innocent use of the war vessels of other nations subject to regulations jointly prescribed; and (*d*) that should the sovereignty of Colombia be threatened because of the closing of the canal to war vessels of other powers, the United States will cooperate with Colombia in the defense of her sovereignty and territory.

It is no secret that the influence of the French canal company was sufficient to secure the rejection of this protocol by the government of Colombia. But through these negotiations, though abortive, the United States made known to the world the terms and conditions we would insist on in making effective our guarantee of protection of 1846.

The correspondence between our Department of State and the British Foreign Office in 1881 throws a flood of light upon the questions of control, protection, and fortification of the isthmian canal. It was then common knowledge that Mr. De Lesseps and the Colombian government were anxious to secure for the Panama Canal an international guarantee of protection and neutrality by the great world powers and it was understood that some European chancelleries had a proposal to that effect under consideration.

In a dispatch from Secretary Blaine to Mr. Lowell, American minister in London, President Garfield's views respecting the protection of the canal were definitely stated to the British government. It was remarked in the dispatch of June 24, 1881:

> By the thirty-fifth article of that treaty [with Colombia, 1846] in exchange for certain concessions made to the United States we guaranteed "positively and efficaciously" the perfect neutrality of the isthmus and of any interoceanic communication that might be constructed upon or over it for the maintenance of free transit from sea to sea; and we also guaranteed the rights of sovereignty and property of Columbia over the territory of the isthmus as included in the borders of the State of Panama.
>
> In the judgment of the President this guarantee, given by the United States, does not require reenforcement, or accession, or assent of any power. * * * If the foreshadowed action of the European powers should assume definite shape it would be well for you to bring to the notice of Lord Granville the provisions of the treaty of 1846, and especially of its thirty-fifth article and to intimate to him that any movement in the sense of supplementing the guarantee contained therein would necessarily be regarded by this government as an uncalled-for intrusion into a field where the local and general interests of the United States of America must be considered before those of any other power save those of Colombia alone, which has derived and will continue to derive such eminent advantages from the guarantee of this government.
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> * * * * * * *
>
> It is as regards the political control of such a canal as distinguished from its merely administrative or commercial regulation that the Presi-

dent feels called upon to speak with directness and with emphasis. During any war to which the United States or Colombia might be a party, the passage of armed vessels of a hostile nation through the Panama Canal would be no more admissible than would the passage of the armed forces of a hostile nation over the railway lines [across the continent] and the United States will insist upon her right to take all needful precautions against the possibility of the isthmus transit being in any event used offensively against her interests upon the land or upon the sea.

The reply of Lord Granville was in effect that the position of Great Britain and the United States with respect to the canal was determined by the engagements entered into by them respectively in what is commonly known as the Clayton-Bulwer treaty. In his rejoinder Mr. Blaine pointed out that the vast armament of Great Britain and her fortresses in the Mediterranean and Red Seas give her the complete mastery of those waters and the control of the Suez route; continuing he said:

It would in the judgment of the President be no more unreasonable for the United States to demand a share in these fortifications or to demand their absolute neutralization than for England to make the same demand in perpetuity from the United States with respect to the transit across the American continent. The possessions that Great Britain thus carefully guards in the East are not of more importance to her than is the Pacific slope with its present development and future growth to the United States. * * * The Clayton-Bulwer Treaty commands this government not to use a single regiment to protect its interests in connection with the Interoceanic Canal, but to surrender the transit to the guardianship and control of the British navy. If no American soldier is to be quartered on the isthmus to protect the rights of his country in the interoceanic canal, surely by the fair logic of neutrality no war vessel of Great Britain should be permitted to appear in the waters that control either entrance to the canal. * * * And as England insists by the might of her power that her enemies in war shall strike her Indian possessions only by doubling the Cape of Good Hope, so the government of the United States will equally insist that the interior, more speedy, and safer route of the canal shall be reserved for ourselves, while our enemies, if we shall ever be so unfortunate as to have any, shall be remanded to the voyage around Cape Horn. * * * A mere agreement of neutrality on paper between the great powers of Europe might prove ineffectual to preserve the canal in time of hostilities. The first sound of a cannon in a general European war would, in all probability, annul the treaty of neutrality and the strategic position of the canal, commanding both oceans might be held by the first power that could seize it. If this should be done, the United States would suffer grave inconvenience and

loss in her domestic commerce as would enforce the duty of an expensive and protective war on her part, for the mere purpose of gaining that control which, in advance, she insists is due to her position and demanded by her necessities. * * * The one conclusive mode of preserving any isthmus canal from the possible distraction and destruction of war is to place it under the control of that government least likely to be engaged in war, and able in any and in every event to enforce the guardianship which she will assume. For self-protection to her own interests, therefore, the United States in the first instance asserts her right to control the isthmus transit, and, secondly, she offers by such control that absolute neutralization of the canal as respects European powers which can in no other way be certainly attained and lastingly assured.

The dispatch specified the essential points respecting which the United States desired that the Clayton-Bulwer treaty be modified. They were in substance as outlined by Mr. Blaine:

First. The United States to have the right to fortify the canal and hold the political control of it in conjunction with the country in which it is situated.

Second. Neither of the two powers — the United States or Great Britain — to acquire territory in Central America, beyond military and coaling stations by the former if necessary for the protection of the canal and voluntarily ceded by the sovereignty controlling the locations.

Third. Free ports at both terminii.

Fourth. Declare obsolete the provision that contemplated the joint protectorate of Great Britain and the United States over any transit that might be established at Tehuantepec or Panama, and

Fifth. The determination of the distance outside the terminii of the canal within which captures in war would be prohibited to be left to the determination of the great powers of the world.

Mr. Blaine continued:

In assuming as a necessity the political control of whatever canal may be constructed the United States will act in entire harmony with the governments within whose territory the canal be located. * * * This government entertains no designs in connection with this project for its own advantage which is not also for the equal or greater advantage of the country to be directly and immediately affected, nor does the United States seek any exclusive or narrow commercial advantage. It frankly agrees and will by proclamation declare at the proper time and in conjunction with the republic on whose soil the canal may be located, that

the same rights and privileges, the same tolls and obligations for the use of the canal shall apply with absolute impartiality to the merchant marine of every nation on the globe. And equally in time of peace, the harmless use of the canal shall be freely granted to the war vessels of other nations. In time of war, aside from the defensive use of it by the country in which it is constructed and by the United States, the canal shall be impartially closed against the war vessels of all belligerents. * * * If it be asked why the United States objects to the assent of European governments to the terms of neutrality for the operation of the canal, my answer is that the right to assent implies the right to dissent and thus the whole question would be thrown open for contention as an international issue. (It is the fixed purpose of the United States to confine it strictly, as an American question, to be dealt with and decided by the American governments.

In the response of Lord Granville to this presentation by Mr. Blaine of the American policy he stated that the British government declined to recede from the view that the treaty of 1850 still continued in full force and also refused to reopen the questions on the basis of Mr. Blaine's suggestions. That our policy with respect to the opening and control of an interoceanic canal was to strictly conform to the terms of the Clayton-Bulwer treaty we were plainly told was the British expectation, and here the correspondence ended for the time being. But as a result of the discussion it was again made manifest to the world that nothing short of the political and military control of the waterway by the United States would be consented to by the American government.

During the presidency of Mr. Arthur many of the reasons cited by Mr. Blaine to show why Great Britain should recede from the position she had taken as to the continued applicability of the Clayton-Bulwer treaty to the canal situation, were reiterated by the then Secretary of State, Mr. Frelinghuysen, who submitted arguments to prove that the treaty itself was voidable at the pleasure of the United States, but the British government continued to insist on her right under that treaty and also to insist that the United States was expected to observe it.

In a dispatch of the British minister in Washington of January 7, 1882, Lord Granville remarked that the British government would not oppose or decline any discussion for the purpose of securing on a general international basis the unrestricted universal use of the

American canal and held that the principles which guided the negotiations of the convention of 1850 were intrinsically sound and continued to be applicable to the then existing state of affairs.

On the 8th of the following May, Mr. Frelinghuysen pointed out that since 1850,

> * * * Almost every form of war and strife had taken place that would seem to make especially necessary the neutralization of the isthmus, and yet the trains of the Panama railroad were run from ocean to ocean peacefully. * * * During the same time another isthmus has been pierced and while war has raged within sight of Mediterranean ports the peaceful commerce of the world has moved through the Suez Canal quietly and safely under no international protection. * * * It will doubtless occur to Lord Granville, as it does to us, that international agreements of this kind — calling for interference by force, and conferring joint rights upon several independent powers — are calculated to breed dissensions and trouble. In times of peace when there is no call for their exercise, they are harmless though useless, but when wars and trouble come it too frequently happens that differences arise and at the very moment when the agreement should be enforced; and such arguments lead to that political intervention in American affairs which the traditional policy of the United States makes it impossible that the President should either consent to or look upon with indifference. * * * a doctrine which has for many years asserted by the United States * * * and has been approved by the Government of Great Britain.

President Cleveland in his first annual message to Congress December 8, 1885, thus stated the conception of the problem of interoceanic communication as related to ownership, domination and control:

> Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit — a trust for mankind — to be removed from the chance of domination by any single power, nor become the point of invitation for hostilities or a prize for warlike ambition. An engagement combining the construction, ownership, and operation of such a work by this Government, with an offensive and defensive alliance for its protection, with the foreign State whose responsibilities and rights we would share is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means.

The reference herein to an offensive and defensive alliance with a foreign state is understood to relate to the Frelinghuysen-Zavala

canal treaty of 1884, which failed of ratification in the senate by a very few votes.

This treaty conferred upon the United States practically the same rights and powers of control and protection that are now secured to us at Panama by the Bunau-Varilla in 1903. The exercise of such powers was denied by the Clayton-Bulwer treaty as interpreted by England. Had the agreement with Nicaragua been ratified and an attempt been made to give it effect a protest from Great Britain would probably have resulted. But Mr. Cleveland withdrew the treaty from further consideration by the senate and diplomatic reconsideration of the subject with Great Britain was not resumed until some fifteen years later.

In 1886 an incorporated company under a franchise from Nicaragua undertook the construction of a ship canal as a private work. After a few years of preliminary operations and failing to secure the necessary capital, an appeal to the government was made for financial assistance. But that was not granted and the company failed in 1893. Shortly thereafter the United States, through first a board and later a commission of experts, made extended surveys, studies, plans, and estimates of the cost of a canal both at Nicaragua and at Panama. The final report of the commission was submitted on January 18, 1902, and on the 28th of the following June a law was enacted authorizing the purchase at a cost not exceeding forty million dollars of the rights and property of the French Canal Company — which had not been able to raise the necessary funds for completing the Panama Canal — and the acquisition upon such terms as the President might deem reasonable of a canal right-of-way across the isthmus and to construct and perpetually maintain, operate, and protect the canal joining the two oceans.

It is therefore evident that public opinion in the United States was not in harmony with the views expressed by President Cleveland in 1885, but Mr. Olney, secretary of state in the Cleveland cabinet some years later, remarked in a review of the canal situation and respecting our engagement with Great Britain:

> If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in

ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter.

In this spirit, in 1900, negotiations for the amendment of the Clayton-Bulwer treaty were taken up by Mr. Hay with the British minister at Washington, and the Hay-Pauncefote draft of treaty of February 5, 1900, was the result. It provided for a neutralized canal under rules generally in accord with the Constantinople Convention of 1888, but the senate would not accept it without radical amendments. The senate required that the treaty of 1850 be superseded, that the United States be free to take measures "for securing by its own forces, the defense of the United States and the maintenance of public order." The article providing for the adherence of other powers to the treaty was struck out.

The British government refused to accept these amendments, but later consented to supersede the treaty of 1850, agreed that the canal may be under the exclusive management and rules of the United States, that as a general basis of neutralization the rules adopted to that end by the Constantinople commission be applied in substance, but omitting the requirement that they shall apply "in time of war as in time of peace," also omitting the rule forbidding fortifications, and a provision was agreed to that forbade any deviation from the general principles of neutralization in case of a change of sovereignty or of the international relations of the country traversed by the canal. The article inviting the adherence of other powers was omitted.

It thus appears that about all that Mr. Blaine and Mr. Frelinghuysen contended for was at last conceded by Great Britain, a sort of neutralization which the United States obligates herself to England, and to England only, to enforce. Whether or not any of the other maritime powers will adopt this principle of neutralization remains to be seen.

It is the declared intention of the United States to exclude from the canal the war vessels of all belligerents, to fortify the waterway, to garrison troops along its course, and to establish naval depots near its terminii. It would follow as a matter of course that the United States in time of war would close the canal absolutely if it was felt

to be necessary in order to safeguard national interests. If this policy was enforced the waterway would be no more international or neutral than is the Kaiser-Wilhelm canal or the entrance to New York harbor. It thus appears that the American canal policy at Panama, like that of Great Britain at Suez, is to maintain an entire freedom of action as respects the use of the waterway in the event of a war involving the power in control.

That the United States would close the canal to the shipping of a power with which we might be at war is certain, but to close it to other belligerent powers, as more than one of our presidents have declared is intended, seems unnecessary. Suez has been open to the armed vessels of belligerents always, notably to French and German vessels in 1870, to Russian and Turkish vessels in 1877, to American and Spanish vessels in 1898, and to Russian and Japanese vessels in 1904, just as were all British ports and waters. So the power controlling the canal be adequate to enforce neutrality upon the isthmus as in neutral harbors, it is not apparent why the war vessels of belligerents should be excluded by the friendly power in possession at Panama. From a point three marine miles off Colon to a point the same distance beyond the territorial waters of the Canal Zone on the Pacific side, such vessels would be as safe and free from molestation as they would be in any neutral port. Why not allow such vessels to effect the transit under the same conditions that would apply should they enter, occupy, and leave a neutral port? An intention to proceed in a contrary manner is to be inferred from the public utterances of several of our presidents and their ministers.

Such then appears to be the American policy as applied to the control and protection of the Panama Canal. Forts will command its ports of access. All belligerents will be excluded. The rates of toll or other charges will be uniform. At Suez forts commanding the approaches are some hundreds of miles away. The war vessels of belligerent powers may freely use it in time of peace as in time of war. The rates of toll and other charges are uniform.

The question as affected by public law and good morals

The Hay-Pauncefote treaty of 1901 is cited as the legal barrier. This agreement, it is claimed, establishes the neutrality of the canal,

and we are therefore morally bound to abstain from the erection of works that forbid the very use of forts and guns. The treaty cited establishes for the American isthmian canal the *general principle* of neutralization as expressed in article 8 of the Clayton-Bulwer convention of 1850. This is a declaration in effect that the canal shall be open upon equal terms to the citizens and subjects of all nations willing to join the United States and Great Britain in extending their protection to the particular waterway then in contemplation over Panama or any other traversing the American isthmus.

This principle is elaborated in article 3 of the treaty of 1901, and contains a substantial restatement of several rules to govern the international use of the Suez Canal adopted at the International Convention of Constantinople of 1888, but in the above cited paper published in this JOURNAL, the author makes no mention of nor allusion to certain very important facts attending the internationalization of the canal of Suez, and the application of the rules to this end which in the Treaty of Washington of 1901 are referred to as rules of neutralization, a word which is not found in the cited convention.

The Suez Canal, opened to the commerce of the world in 1809, was declared by the Khedive of Egypt to be a neutral waterway, free upon equal terms to all nations, and such a status of the canal was recognized and confirmed by a firman of the Sublime Porte in 1866. But in 1882, when Great Britain, for and in the name of the Khedive, undertook the suppression of a revolt against his authority, the neutrality of its waters was disregarded or ignored by Great Britain, notwithstanding a protest of the president of the canal company, who alleged that the action of Lord Wolsley in making the canal and the canal port of Ismalia a scene of military operations against Arabi Pasha, who was, or shortly before had been, in actual possession and control of all Egypt outside of Cairo and who was at the head of a government *de facto*. No deference was paid to this protest which had received the indorsement of the French government, and the revolt was suppressed by the British forces unaided by any under the orders of the Khedive acting as allies.

It was claimed that since the military measures taken by the British were for the suppression of disorder in behalf of the Khedive the

using of the canal as a military base for this purpose was not in contravention of the firman of the Sultan, but the British military occupation of Egypt followed, and notwithstanding the repeated assertions that that occupation was to be but temporary it has continued for twenty-seven years and the world is ignorant of any intention of Great Britain to terminate it. By the Constantinople convention it evidently was attempted to give to the Sultan's firman of 1866 an international character, the plenipotentiaries of all the great and some of the lesser European powers taking part in forming, and all subscribed to, its terms; even the Sublime Porte was a party to the treaty.

We find in article 4 this declaration:

* * * the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers.

Yet article 10 contains a provision that recognizes the right of the Sultan or Khedive to take measures they might find necessary in "securing by their own forces the defense of Egypt and the maintenance of public order." In article 12 "the rights of Turkey as the territorial power are assured."

It appears that the Constantinople Convention was the outcome of a proposal to internationalize the canal made by the British government in 1883 — very soon after her occupation of Egypt — to the French, German, Austrian, Italian, and Russian governments. At the sixth sitting of the commissioners on June 13, Lord Pauncefote for Great Britain made an important statement which had all the features of an ultimatum. In 1887 the French and British divergence of opinion having been adjusted, Lord Salisbury brought the protocol as agreed upon to the attention of the powers, whose delegates had participated in the discussions, again repeating the British view originally stated by Lord Pauncefote, which was as follows:

The delegates of Great Britain, in offering this text as the definite rule to secure the free use of the Suez Canal believe it is their duty to announce a general reservation as to the applicability of its provisions in so far as they are incompatible with the transitory and exceptional state

in which Egypt is actually found and so far as they might fetter the liberty of action of the government during the occupation of Egypt by the British forces.

Here then is a declaration by the power proposing the placing of the canal under international protection — made at a time when it was the declared intention to make the British occupation temporary — that so long as Egypt remains under British guardianship, that power will conceive herself as free to disregard its provisions if thought to be incompatible with Egyptian or British interests. But notwithstanding the reservation all the powers including Turkey ratified the convention. They had been told that the British military occupation of Egypt was temporary and an international control of the canal was suggested on the basis of a memorandum from Lord Granville specifying the conditions proposed for acceptance by the powers.

A perusal of the parliamentary papers in which the correspondence leading up to the meeting of the delegates and their proceedings in Paris are published shows that France was the power whose views respecting the control of the canal differed widest from those of Great Britain. It was the wish of the former power to place the control of the canal as respected protection and neutrality under the supervision of an international commission, to forbid the intervention of an ally in the defense of Egypt, and in many ways to embarrass the British in the military occupation of the country. The basis of discussion proposed by Lord Granville in his invitation for the conference and that proposed by the French delegate at Paris were widely at variance. During the six sittings these differences were argued *pro* and *con* with great earnestness. The other delegates, although showing a leaning to the French view, were little more than spectators. At the close of the final sitting on June 13, 1885, the British delegates were uncompromisingly opposed to several articles and a deadlock resulted, but two years later an adjustment was reached through direct diplomatic discussion between the two chancelleries. The convention was ratified at Constantinople on October 29, 1888. Great Britain, France, Germany, Austria-Hungary, Spain, Italy, Russia, Holland, and Turkey have agreed to the broad principle that the

power responsible for the government of a country traversed by a ship canal is free to take such measures for the protection and use of the canal as may seem best to the power exercising the sovereignty.

In 1898 Spanish war ships at Port Said wished to coal and refit while en route through the canal to the Orient with the avowed hostile purpose of ending the American occupation of the Philippines. Lord Cromer for the government of Egypt refused the permission sought, so proving that the Suez Canal was not in fact internationalized. On July 12, 1898, in the British House of Commons Mr. Curzon stated in reply to an inquiry,

> The convention in question (Constantinople, October 29, 1888), is certainly in existence but has not been brought into practical operation. This is owing to the reserves made in behalf of her Majesty's Government by the British delegates at the Suez Canal Commission in 1885, which were renewed by Lord Salisbury in 1887.

The action of Great Britain in 1882 in making the Suez Canal a base of military operations and in 1898 in refusing to consider it as an international waterway, free to all in peace and war, is quite consistent with her action in conceding to the United States what is in effect an equivalent privilege or responsibility when in 1901 the Hay-Pauncefote treaty was formulated and the Clayton-Bulwer treaty superseded.

It will not be forgotten that at this date, 1901, the United States could exercise no sovereign power over the territory where the isthmian canal was to be made. If we entered upon such construction it had to be within the territory of another sovereignty, and only such rights of control and protection could be exercised as might be delegated by that sovereign, yet Great Britain waived the rights she had under the original Clayton-Bulwer treaty rights which were reiterated in the first Hay-Pauncefote treaty, to forbid fortifications, and conceded that the United States "shall have and enjoy the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal" and "shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder. * * * The transit of such vessels [of war of a belligerent] through the

canal shall be effected with the least possible delay, in accordance with the regulations in force."

There is also the provision above cited for applying the rules of neutralization formulated by the Constantinople Commission of 1888, which Great Britain herself has ignored at least once, and has declared have never been brought into practical operation. Lord Pauncefote who for Great Britain negotiated with Mr. Hay the treaty of 1901, had filed the British reservation. Its text was also known to Mr. Hay when he signed the first and second treaties with Lord Pauncefote for the British Blue Book contained the *procès-verbal* and had been published some twelve years before. Had the British-American treaty of 1901 been made two years later, that is, after the United States had acquired in perpetuity at Panama every right that the sovereign could exercise, rights certainly as broad and complete as any England could temporarily exercise at Suez, it requires no stretch of the imagination to believe that there would have been in the supposed agreement, expressed or implied, a clear and unequivocal recognition of the freedom of action of the United States with respect to the protection, control, and defense of the isthmian waterway.

Exactly two years after the signing of the Hay-Pauncefote treaty the United States secured from the Republic of Panama, in consideration of the payment of ten million dollars and our guarantee of their independence, besides the right of way, harbors, additional lands and islands, the right " at all times " to erect fortifications and employ armed forces for the protection of the canal, also the right to demand the sale or lease by Panama of lands necessary for naval stations.

If it be admitted as proved that the neutralization agreed upon for Panama by Great Britain and the United States forbids the exercise of force in protecting the waterway then the United States has already ignored the treaty of 1901. If the British Foreign Office entertains this opinion then it is impossible to believe that our government has not been called to account or asked to reconcile our actions in preparing to fortify Panama with our obligation to abstain.

The Hay-Bunau Varilla treaty was entered into nearly six years ago. There has been no public mention nor any allusion to the filing in Washington of any protest, remonstrance, or interrogatory respecting the American proposal to defend Panama. On the other hand, the press dispatches make frequent mention of the measures taken by the War Department and the plans discussed looking to the erection of forts near Panama and Colon. It appears that the sites for these works have been chosen, their respective armaments designated and the plans of the canal changed so as to remove some of the locks from the places where they would be exposed to bombardment to a point several miles inland, and surveys have been made of the Chiriqui Lagoon to ascertain its capabilities as a naval and coaling station, indeed the name of one of the proposed forts has been officially announced. The president of the canal commission has proposed that the fortifications be constructed while the canal-making is in progress, so that both may be finished and available at the same time, and still no protest from Great Britain so far as the public is advised.

There will be no protest. The course the United States is pursuing is exactly the one Great Britain would adopt were that power making the canal at Panama. With her great fleet always in the Mediterranean and land forces at Gibraltar, Malta, Aden, and in Egypt, there is no need of defenses at Ports Said and Tewfik. The Suez Canal is now controlled and protected as effectively from these fortress bases as it would be were it lined with forts, but the isthmus of Panama is two thousand miles from our main naval bases on the Atlantic and quite three thousand from our main Pacific dockyard.

In this connection it is suggestive to note that in the framing of article 4 of the Constantinople treaty, France proposed the word *approaches* in lieu of the phrase *ports of access* as finally agreed upon. The English delegates pointed out that a colleague on the commission had already suggested that the whole of the Red Sea was but an " approach " to Suez, and that Great Britain could not consent to the possibility of being placed in a position when she might be compelled to neutralize her fortifications in the Mediterranean and Red Seas.

The rights and privileges, responsibilities, and immunities of the

commercial and war vessels of all nations, save as to one state of affairs, are clearly specified in the convention of Constantinople. The rules therein laid down the United States and Great Britain agree shall apply to Panama, but with the saving clause that *all* ships are to be subject to the canal regultions which the United States has the exclusive right to prescribe, as an incident of ownership and construction.

The exception relates to a supposed state of war between Great Britain and another power. Is it conceivable that such belligerent would propose to pass her armed vessels through Suez? It is unthinkable unless that hostile power has a force adequate to overcome British resistence. His Majesty's government has in effect plainly said to the world that a belligerent at Suez may expect resistance so long as British control continues in Egypt. When that control ceases Britain will conform to the international rules, her fleets and fortresses remaining intact on guard over the "approaches," in fact over the waterway itself, the Khedive and the Sultan taking any desired measures for securing by their own forces — not with allies — the defense of Egypt, and the maintenance of public order.

So too at Panama. Should the United States be at war with any power the hostile fleet will be interdicted and repelled by force, all the commercial vessels of all the world besides passing and repassing according to the rules of neutralization embodied in the convention of Constantinople as modified by the Hay-Pauncefote treaty, and the American regulations that are to be prescribed and enforced by the United States.

Hence it is that the conditions repecting control and protection at Suez or Panama adverted to in the above cited paper not only cover the same ground, but they are identical save that in the case of Suez eight of the European powers, including the sovereign of Egypt, tacitly agree or concede that so long as England remains mistress there that power shall have complete liberty of action, respecting nationalization, free to deny to the waterway a neutral character as has been done in a particular case to the advantage of America, and free to make the canal a military base as was done about a year before the commission was invited, and save also that the rules of nationaliza-

tion, called "neutralization" in the Hay-Pauncefote treaty, that is the regulations governing the application of the "general principle" of neutralization, and use and management of the Panama Canal are to be prescribed exclusively by the United States. Again, the control of England in Egypt is admittedly temporary, while that of the United States at Panama is perpetual.

Article 2 of the Clayton-Bulwer treaty provided that should the United States and Great Britain become belligerents the war vessels of each power should be exempted from blockade, detention, or capture and for an unspecified distance from the canal terminii. This treaty was entered into nineteen years before any great maritime canal had been opened to traffic, but in 1882 the British government, in making a military use of the Suez Canal, disregarded this principle in the opinion of many. It is not surprising that the provision adverted to, contained in this article 2 of the treaty of 1850, is not found either in the first or second Hay-Pauncefote agreement. The utter impracticability of enforcing such a rule had probably become manifest.

Defenses at Panama

With all the world at peace, treaties of amity and concord existing with and between each and all the greater and lesser powers, what is the need of armaments and forts? Certainly not to resist the assaults of pirates and freebooters. Surely not for the repression of internal disorders. Why then are the nations armed and arming? Why are they expending a third of their revenues besides the proceeds of loans, on armies, navies, and fortresses? Every one knows the answer. It rests in doubt, suspicion, jealousy, or fear. Each nation believes, or fears, or suspects, or imagines that another is waiting or would seize upon a favorable opportunity to attack; offensive and defensive alliances are formed by two or more powers; inventions, plans, and preparations for war are kept secret; harbors are mined; battleships, cruisers, submarines, torpedo, and other war craft are building; every great commercial emporium, naval base and important strategic point is strongly fortified. Shall a point as important in strategy and commerce as the Panama Canal be left undefended to be seized and held or destroyed by a hostile force?

Why these tremendous preparations for attack and defense? Every power engaged in the rivalry says that they are to resist possible aggression or for the protection of oversea commerce. Two attempts have been made at international peace conferences to reach an understanding respecting a limitation of armaments, afloat and ashore, but apparently without any result whatever except to stimulate the rivalry. Reduced to a final analysis all this outlay is for insurance against a real or imaginary danger. The risk was real to Austria in 1866, to France in 1870, and to Russia in 1904.

No power will declare war against another unless success in the campaign is expected. If a post be adequately defended it will not be attacked. If lost to the enemy the victor will exact its ransom in money or territory. Several of the European powers have declared by treaty that the Kingdom of Belgium is neutralized, yet the Belgian fortifications are sometimes considered a model by military men to be copied, but not improved upon. Nobody seems to be able to say authoritatively what Belgian neutrality means, and so that little kingdom feels a sense of security in a fortified frontier, the strength of which has been vastly augmented since 1839, when the Kingdom was neutralized.

If some of the great maritime powers would solemnly pledge themselves to join in the real, effective, guaranteed neutrality of the Suez and Panama canals, and undertake to enforce that neutrality, if necessary with fleets and armies, each agreeing to accept penalization in whatever sum the Hague Tribunal might adjudge for any infraction of the agreement we might expect or hope that the guarantee would be effective, but such united action for a common purpose has never been seen. Until the millenium we may not see it; meanwhile it behooves those in effective control of great commercial and strategic waterways to safeguard their respective interests. Nor is it surprising that such coalitions are not formed. Why should Spain, with small interests at stake in Suez, pledge and make effective at large cost, her active intervention in maintaining a transit worth much more to Great Britain alone than to all the world besides?

The canal at Suez is the most important artificial waterway,

measured by the value of passing ships and merchandise, that exists. But besides its commercial importance it is of vital moment to Great Britain as a passage through which she maintains quick and easy communication with India, Australia, and the East. She can never permit this great strategic route to be closed or controlled by adverse interests. The British flag is the national flag of about two-thirds of the passing vessels. Year by year we hear less of the ending of the British occupation in Egypt. The world appears to have become reconciled to this occupation. France, formerly the most strenuous objector, has recently become placated. The canal is entirely neutral in that its use is free to all vessels armed and unarmed, belligerent and friendly, on equal terms, so long as Great Britain be not a belligerent. She takes no chances, and the world appears to be quite reconciled to the status quo.

Great Britain at Suez and the United States at Panama will be similarly situated, commercially and strategically. Voyages from the commercial metropolis of England via Suez to Aden, Bombay, Calcutta, Singapore, Hong Kong, Melbourne, and Aukland, range in length from 4,700 to 12,900 miles, some of which distances via the Cape of Good Hope are 5,500 miles longer, while the distance from the American commercial metropolis via Panama to San Diego, San Francisco, Port Townsend, and Sitka range from 4,900 to 7,600 miles, but via Magellan they are 8,400 miles longer. For no other nations have these waterways a tithe of the importance that they have for the powers that respectively dominate and control them. What can be more fitting than that they protect and defend them?

Great Britain's control at Suez results primarily from her relation to Egypt, and incidentally from the fact that she owns 44 per cent. of the property — by far the largest stockholder — and about two-thirds of the canal tonnage is British. There is that other reason of overmastering force, the need of maintaining the closest possible touch with her possessions beyond Suez. Having in Egypt, as has the United States at Panama, all the power that a sovereign could exercise, she sees to it that a mob or an enemy shall not obstruct the canal. A few vessels sunk in the channel overnight might determine a campaign.

It has been said we have declared that we will assure to all the world the free use of the Panama Canal on equal terms to all, but is this the fact? Have we not rather announced that it shall be open for the use of all nations which are at peace with us and with one another? We have announced that we, exercising sovereign power at Panama, will warn all belligerent nations that their war vessels are not only unwelcome, but will be repelled. If we should be at war we will make use of the canal as a military base. We must be prepared to enforce our will. This we purpose to do as we would defend Manilla, New York, San Francisco, as Germany defends Kiel, as England protects Plymouth, Singapore, and Hong Kong, as she guards the approaches to Suez by fortresses at Malta and Aden. Whether the point in jeopardy be far from home or near, the presence thereat of means of defense and men behind the guns adds to the sense of security and makes the hostile power weigh the chances and count the cost before attacking.

In any war between the United States and a first-rate naval power the issue will probably be decided very speedily by a great combat at sea. Should the issue leave us vanquished, it would be less humiliating and less burdensome for us to settle with Panama still under our flag than see it in the hands of the enemy. If undefended and not effectively neutralized by an international guarantee that was certain to be enforced at the cost of blood and treasure of the guarantors, then the supposed enemy with a few second-rate war vessels and a few hundred men could seize it, a work that will have cost us many hundreds of millions.

It is here asserted, and is admitted by the author of the paper on "Neutralization of the Panama Canal," published in the April number of this JOURNAL, that with a few sticks of dynamite "a few resolute men" could destroy a lock. While this is dissented from, but admitted if the lock gates instead of the lock itself is meant, yet the greatest danger of disablement would arise from a different form of attack "by a few resolute men." Suppose the United States at war with a west coast South American state that has no navy, and an army exclusively employed in defending its own territory, which the American forces propose to invade, making use of the canal in forwarding our troops. Suppose a few *very* resolute men on board

of a foreign tramp, sailing from a neutral port be met in mid-ocean by another whence is transferred to the former a few hundred tons of high explosives, and the voyage resumed, the canal entered, an upper lock negotiated, and while being locked up or down a train lighted that in a minute will explode the dynamite, the crew deserting the vessel and surrendering as prisoners of war after announcing that in thirty seconds the ship will be blown up. To guard against such jeopardy seems next to impossible. The explosion would destroy the lock and its mate, including the gates above and below. Lake Gatun would be drained and the canal disabled for months. Another Hobson, or men such as were the Japanese officers who attempted to blockade Port Arthur, would take up this task with enthusiasm.

Fortifications and battalions could not prevent such a catastrophe. But every other danger would be lessened or removed if forts guarded the entrances. A mobile garrison on the isthmus of 10,000 men would be adequate to protect the neighboring coasts from any landing force likely to be employed if our fleets could challenge the issue. Guns on the headlands at the ports would ensure the free exit of our own vessels, search-lights ashore would disclose the night operations of the enemy. All the advantages would be with the defense; even the jungle and the climate would be most potent aids.

With suitable batteries on points Toro Escondido, Brujas, and Lorenzo — Colon side — with some second-rate vessels; and with batteries on points Paitillo, Mala, and the islands in Panama Bay, with a few second-rate war vessels and torpedo craft — these defenses supplemented with an isthmian army corps adequately supplied — and the country could be content that to overcome such dispositions an attacking force three or four times that of the defenders would be required for the mastery of the canal — and a time as long as it took the Japanese to capture Port Arthur.

Reverting again to the negotiations leading up to the signing of the Constantinople convention, it may not be inappropriate to refer to the opposition of the British delegates at the conference, when France introduced the word "guarantee" into the phraseology then contemplated in the internationalization of the Suez Canal. Great Britain would have none of it, and the word went out. There was no obvious difficulty in securing a promise by each of the eight

powers to respect the neutrality of the canal, but when it came to guaranteeing such nonintervention, their own or of others, it was quite a different matter, and it indicates how hopeless would be the task of securing such neutralization at Panama as would be effective.

Guns suitably placed and manned at Panama, supplemented by a moderate mobile force and a few coast defense vessels will, in the judgment of the writer, vastly add to our security there and at home in the event of hostilities with any power, and will besides permit the fighting fleet to make its own dispositions for meeting the enemy in either ocean, or on both oceans. The battleship fleet must not be tied down to harbor protection. It will be unless our shores and possessions are adequately defended by guns and battalions.

The function forts will serve at Panama is the same they will serve at any continental or insular port or military or naval base. They safeguard the locality from invasion and guard bases to which the fleet may resort for supplies, but to a nation possessing a naval force capable of contending for the mastery of the sea, coast defenses have an importance difficult to even state.

The naval commander in chief, having knowledge that his bases are secure, that he is not called upon to act as coast-guard, may select his own point of attack upon the enemy, and may transfer his forces from one to the other ocean as strategic considerations may dictate without concern as to the obstruction of his route of transfer.

That the fortification of the canal will be an added burden is quite true, but our greatest statesmen of the last half century have declared that the control and protection of the ship waterway at the American Isthmus is essential to our existence as a nation, and the people have ratified the decision.

The conclusions of the writer on the questions proposed for discussion are:

1. It is the declared policy of the United States to control and defend the canal as a part of the coast-line of the United States.

2. Neither public law nor moral obligations are in conflict with this policy.

3. Fortifications at Panama are as essential to the protection of our national interests as they are on our coasts which by the canal are brought 8,400 miles nearer the one to the other.

GEORGE W. DAVIS.

THE HISTORY OF THE DEPARTMENT OF STATE
IV

SOMETIME AND OCCASIONAL DUTIES OF THE DEPARTMENT

In previous papers of this JOURNAL I have shown that the Department of State was created to manage not only the foreign affairs of the government, but such domestic executive business as did not naturally fall under the war and treasury departments;[1] and in addition it has performed certain temporary or occasional duties some of which have passed to other departments and some of which are still under its jurisdiction. In the natural expansion of the business of the government the tendency has been to transfer from the Department all those duties which are purely domestic, and those which have been thus transferred will now be considered.

First in magnitude is the granting of patents for inventions. The act of April 10, 1790, which first regulated the business, authorized the Secretary of State, Secretary of War, and Attorney-General, or any two of them, to issue letters patent in the name of the United States upon petition setting forth the invention or discovery of "any useful art, manufacture, engine, machine, or device, or any improvement therein, not before known or used," if the invention or discovery was deemed to be useful and important, granting to the petitioner, for a term not exceeding fourteen years, the sole and exclusive right of making, using, and selling it. The Attorney-General was to examine the letters patent, and, if he found them to conform to the act, was to so certify and present them to the President, who was to cause the seal of the United States to be affixed, when they became available, and, after having been recorded in the Secretary of State's office and endorsed by him, they were to be delivered to the patentee or his agent. The grantee was to deposit descriptions, specifications, drawings, and models, and certified copies of the specifications were

[1] See this JOURNAL, *1*:867, *2*:591, *3*:137.

to be accepted before all courts as competent evidence. Copies of specifications and permission to have copies of models made were to be granted upon application to the Secretary of State. Penalties were provided for infringements. The fees to be paid by patentees to the several officers who made out the letters patent were: for receiving and filing the petition, fifty cents; for filing specifications, ten cents for every copy sheet of one hundred words; for making out the patent, two dollars; for affixing the great seal, one dollar; for endorsing the day of delivering the patent, and all intermediate services, twenty cents.[2] Remsen, the chief clerk of the Department, who was immediately in charge of the patent business, prepared the papers for final action by the board, and the patent granted to Samuel Hopkins July 31, 1790, which was the first one issued, was signed by the President, Thomas Jefferson, and Edmund Randolph, the Attorney-General. February 21, 1793, another act was approved abolishing the joint agency and lodging the granting of patents in the Secretary of State, the Attorney-General, however, to examine the letters patent and pass upon their conformity to the act.[3]

In 1802 began the real formation of the Patent Office with the assignment to the duty of superintending that part of the Department's business of a remarkable and versatile character, Dr. William Thornton, who was styled Superintendent of Patents, and who continued in that office for twenty-six years, until his death March 28, 1828.[4] He received his first government appointment in connection with the laying out of Washington in 1794. It appears from his letters that he had been a student at the University of Edinburgh and in London and Paris where he studied mineralogy under Faujas

[2] I Stat. 109.

[3] *Id.*, 318.

[4] No biography of Thornton exists, but a careful study of his career and accomplishments would be interesting and valuable. He had studied medicine; he was the author of erudite pamphlets on the origin of language; his genius in architecture is stamped upon the Capitol; he helped to lay out the grounds of the White House. He became an ardent sympathizer with the South American struggle for independence and applied for a South American mission. A great many of his letters are in the Department of State MSS., especially among the applications for office, 1809–1828, and his papers are in the Library of Congress MSS.

de St. Fond.[5] His salary at first was $1,400 per annum, but was increased by Madison from October 24, 1808, to $2,000, until 1810, when inadequate appropriations compelled its reduction. In a memorial to the House of Representatives, dated March 21, 1818, he submitted an account for a balance due him of $4,186.18.[6]

His administration was marked by friction with the secretary and inventors, the latter charging him with discrimination and personal interest in some of the patents issued. Among the most vigorous of these complainants was Robert Fulton, between whom and Thornton a bitter feud arose. Fulton, in a letter dated December 27, 1814, wrote the Secretary, asking that patents granted Thornton be annulled, as they were infringements on his inventions and that Thornton be dismissed from office.[7] On December 23, 1814, Thornton had petitioned for a patent for an improvement in the application of steam to flutter or paddle wheels on the sides of a boat. Fulton's request was granted in part, and Thornton was prohibited from taking out any patents while he held the office of Superintendent,[8] a verdict against which he protested vigorously. He described the vexation of his situation in a letter to Secretary J. Q. Adams December 13, 1817, saying:

> I have hopes if there be a purgatory, that the Superintend[t] of the Patent office will be exempt from many sufferings in consequence of the dire situation he has experienced on earth.[9]

The method of procedure required the applications to be made to the Superintendent, who passed upon them and then submitted the question of issuing the patents to the Secretary of State, and applicants who were dissatisfied with the Superintendent's ruling appealed from them to the Secretary of State.[10]

Upon Thornton's death Thomas P. Jones was appointed the Super-

[5] Thornton to J. Q. Adams, September 15, 1820; to Jefferson, January 8, 1821; to Madison, January 20, 1821. Department of State MSS. applications for office.

[6] Department of State MSS., Miscellaneous Letters, *62*:5.

[7] *Id.*, vol. 45.

[8] *Id.*, vol. 45.

[9] *Id.*, vol. 59.

[10] *Id.*, vol. 59.

intendent, and he in turn was succeeded by Dr. John D. Craig in 1830. Craig was the first to make an orderly arrangement by subjects of the drawings and models in his charge, but his methods of business were so irregular that an official investigation became necessary in 1833. He was censured and a number of new rules for conducting his office were laid down.

In 1810, by act of April 28, Congress authorized the moving of the office to a new building which was to be erected, and April 11, 1816, President Madison recommended the establishment of a distinct patent office under the Department of State, with an adequate salary for the Director.[11] Additional quarters were provided for in 1828 and in 1836 the Patent Office building was ordered to be built.[12]

The title of Superintendent which Thornton held by courtesy was not recognized by law until April 23, 1830, when the salary was fixed at $1,500.[13] The whole system underwent modification, and all previous acts were repealed by the act of July 4, 1836, which created the office of Commissioner of Patents, under the Department of State, provided for a chief clerk, authorized the designing and using of a separate seal, and specified minutely how patents were to be applied for, granted, etc. All patents were to be signed by the Secretary of State, and countersigned by the Commissioner of Patents.[14] In 1849 when the Department of the Interior was formed the Patent Office became a part of it and all the records were transferred as the act required. It had, for all practical purposes, been independent of the Department of State for some years. From 1790 to 1836 the Secretary of State reported annually the lists of patents to Congress, from 1836 to 1842 the reports were made by the Commissioner of Patents, and after 1843, until the business passed to the Interior Department, the reports included the claims of patents granted.[15]

[11] Messages and Papers of the Presidents, *1*:571.

[12] IV Stat. 303, V. 115.

[13] IV Stat. 396.

[14] V Stat. 117 *et seq.*

[15] On the subject of the history of the Patent Office, see Official Gazette, vol. 12, No. 15, and the "Patent System of the United States, a History," by Levin H. Campbell, Washington, 1891; also Annual Report of the Commissioner of Patents, 1900, VIII, "The American Patent System."

The control of the federal government over the granting of patents was given by the eighth section of the first article of the Constitution which conferred upon "Congress the power to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Copyrights and patents were thus grouped together and the former became in a limited degree a part of the sometime duties of the Department of State.

In 1783 Connecticut, New York, Massachusetts and New Jersey, in the order named, adopted copyright laws, and in 1785 Virginia and Delaware, but the other states never had such laws.[16] Under the new government the system was regulated by the act of May 31, 1790,[17] requiring, in order to secure copyright of a map, chart or book, first, that its title be deposited in the clerk's office of the United States District Court where the person in interest resided and the record of the clerk inserted upon the first or second page; second, that public notice be then given in the newspapers; and third, that within six months a copy of the publication be deposited in the Department of State for preservation. The copyright was to run fourteen years, as in the case of a patent, and might be renewed. By a subsequent act[18] (April 29, 1802), the provisions were extended to engraved prints. In 1831[19] (act of February 3), musical compositions were included, and the clerks of the courts were ordered to transmit at least once a year to the Secretary of State certified lists of all copyrights granted by them and copies of the books or works for preservation in the Department. It was thus never more than the place of deposit of copyrighted works and of the records. A book when transmitted directly by an author was usually accompanied by a letter of which the following is an example:

[16] "Origin of the Copyright Laws in the United States," in "A collection of Papers on Political, Literary and Moral Subjects," by Noah Webster, p. 173 *et seq.*, New York, 1843.

[17] XV Stat. 125.

[18] II Stat. 171.

[19] IV Stat. 436.

Boston, Jany. 2, 1819.

Dear Sir,

I have transmitted a Copy of a Spelling Book which I have just published, which I wish to have deposited in your office, according to Law, to secure the Copyright. I have also taken the liberty to send you a copy which I hope will meet with your approbation — if it should, I should feel myself under great obligation, to have you make its merits known.

I remain with due respect & Esteem, Your friend,

& humble servt

ISAIAH THOMAS, Jr.

The act of February 5, 1859,[20] ordered that all the "books, maps, charts, and other publications of every nature whatever" deposited in the Department of State, together with all the records in regard to them should be removed to the Department of the Interior and henceforth be under its control. This terminated the Department's connection with this branch of the government's business. It remained with the Interior Department until 1870, when it passed under the control of the Librarian of Congress.[21]

The second section of article 1 of the Constitution required that an enumeration of the inhabitants of the United States be made within three years after the meeting of the first Congress, and the first census was, accordingly, ordered by the act of March 1, 1790, to be made by the several United States marshals who had power to appoint as many assistants as they might deem necessary. The enumeration was to begin on the first Monday in August and to close within nine months. The marshals were to file the returns with the several clerks of the federal district courts for preservation and forward the aggregate results of the enumeration to the President. Each assistant marshall was required, before sending his report to the marshal, to cause a signed copy of it to be posted in the most conspicuous places in the district for public inspection. The President sent the returns to Congress, and they were ordered to be printed under the supervision of the Secretary of State. The first printed census bore an indorsement dated October 24, 1791, which said it was "truly stated from the original returns deposited in the office of the Secretary of

[20] XI Stat. 380.

[21] R. S. U. S. 4948.

State." The volume had been prepared for the press by the Department by which also it was distributed. The marshals occasionally asked for and received instructions on the subject of their duties from the Department. The authority of the Secretary of State was increased by the law authorizing the second census (February 28, 1800), the clerks of the district courts being required to send the returns directly to him.[22] He was also required to furnish necessary instructions to the marshals.

The first two censuses were a bare enumeration of the population. In the schedule of 1790 there were but six inquiries. These were, "names of heads of families," "free white males of sixteen years and upwards, including heads of families," "free white males under sixteen years," "free white females, including heads of families," "all other free persons," "slaves." The schedule of 1800 had fourteen subdivisions, providing a more minute enumeration by ages, and an inquiry covering "all other free persons, except Indians, not taxed." In the census of 1810 the first attempt was made to obtain statistics of manufactures by a separate schedule with upwards of sixty-eight subdivisions, "cotton manufacturing establishments," "cotton duck," "hempen manufacturing establishments," etc. This part of the census was, however, under the supervision of the Secretary of the Treasury. It was repeated in the census of 1820 (Act of March 14), but put "under the direction of the Secretary of State, and according to such instructions as he shall give, and such forms as he shall prescribe." The population schedule of this census provided for an enumeration of "foreigners not naturalized."

The circular instructions issued to the marshals June 20, 1820, by J. Q. Adams were long and minute and were accompanied by full schedules which were to be used. The purposes of Congress in passing the law were, according to the circular not only to obtain the aggregate amount of the population of the United States, but also,

> to ascertain in detail the proportional numbers of which it is composed, according to the circumstances of sex, color, age, condition of life, as heads or members of families, as free or slaves, as citizens or foreigners, and particularly of the classes, (including slaves) engaged in Agricul-

[22] I Stat. 101.

ture, Commerce, and Manufactures — And, also, to obtain an account of the manufacturing establishments, and their manufactures, throughout the United States.[23]

The census of 1830 omitted the manufacturing statistics, but they were restored in the schedule of 1840. There was also a schedule of "universies or colleges," "number of students," "academic and grammar schools," "number of scholars," "primary and common schools," "number of scholars," "number of scholars at public charge," "number of white persons over 20 years of age who cannot read and write." Following is a description of the census publications as long as they were issued by the Department of State and of the cost of each census.

1790. "Return of the whole number of persons within the several districts of the United States, &c." The first census publication was an octavo pamphlet of fifty-two pages, published in 1792. The entire cost of this census was $44,377.18.

1800. "Return of the whole number of persons within the several districts of the United States, &c." This was a folio of seventy-eight pages, published in 1801. The cost of this census was $66,609.04.

1810. The report of this census was in two folio volumes: I. "Aggregate amount of each description of persons within the United States, &c." This was an oblong folio of ninety pages; but it does not show the date of publication. II. "A series of tables of the several branches of American Manufactures, exhibiting them in every County of the Union, so far as they are returned in the Reports of the Marshals and of the Secretaries of the Territories, and of their respective assistants, in the autumn of the year 1810; together with returns of certain doubtful goods, productions of the soil and agricultural stock, so far as they have been received." 170 pp., 4to. Edited by Tench Coxe, and published May 30, 1813. The cost of the census of 1810, $178,444.67.

1820. I. "Census of 1820, &c.," a folio of one hundred and sixty-four pages; published in 1821. II. "Digest of Accounts of Manufacturing Establishments, &c.," a folio of one hundred pages, printed in 1823. Cost of the census, $208,525.99.

1830. "Fifth Census or Enumeration of the Inhabitants of the United States." This volume was a large folio of 163 pages, printed in 1832. This report was so wretchedly printed, that Congress required by law a republication, which was made the same year under the immediate direction of the Secretary of State. The erroneous and corrected editions are bound together. This republication enhanced the cost of this census to $378,543.13.

[23] Circulars, vol. 1, No. 15, Department of State.

1840. I. "Compendium of the Enumeration of the Inhabitants and Statistics of the United States," a folio of 379 pages, printed in 1841. II. "Sixth census or Enumeration of the Inhabitants of the United States," folio of 470 pages, 1841. III. "Statistics of the United States, &c.," a large, oblong folio of 410 pages, 1841. IV. "Census of pensioners for Revolutionary and Military Service, with their names, ages, and places of residence, &c." 4to, 196 pages.

The total cost of these censuses was $844,370.95.[24]

The act of March 23, 1850, transferred the taking of the census of that year to the Department of the Interior, under whose supervision it remained [25] until on July 1, 1903, it passed to the new Department of Commerce and Labor.[26]

Although the office of Attorney-General was established in 1789 (act of September 24), he was given no office of his own, as it was supposed that his duties for the government would only occupy a part of his time. His public office was his private law office also, but so far as he had a public office it was in the Department of State, until in 1818 an office was given him by Congress. The federal judges, marshals and attorneys corresponded with the Secretary of State, and the two latter received instructions from him, and were not under the law under the authority of the Attorney-General. Thus, on July 27, 1801, the attorney for Georgia transmitted a report of the cases which had been instituted and decided and which were still pending in the United States circuit court; on March 7, 1791, the attorney for Maryland reported on the laws of that state which might be construed as conflicting with the treaty between the United States and Great Britain; the attorney for Pennsylvania on March 7, 1791, reported that Henry Smith, a counterfeiter, then in jail, desired to give information concerning counterfeiting if he might receive a pardon, and asked for the President's instructions in the premises; on August 24, 1793, the attorney for Massachusetts reported concerning the fitting out of French privateers. The correspondence with the marshals was similar to that with the attorneys. Thus, on December

[24] Report of Committee on the Ninth Census, to the House of Representatives, by Mr. Garfield, January 18, 1870, 41st Cong., 2d Session.

[25] IX Stat. 428.

[26] See "History and Growth of the U. S. Census," by Carroll D. Wright and William C. Hunt, Senate Doc. No. 194, 56th Cong., 1st Sess., 1899–1900.

1, 1790, the marshal for New York asked for leave of absence to visit Europe; the marshal for Pennsylvania reported December 3, 1790, that a fine had been imposed upon Shubael Swain for attempting to defraud the revenue of the United States; on April 17, 1813, the marshal for Georgia sent the petition to John McNish, an alien, for permission to remain at Savannah. The judges were, of course, under no obligations to report to the Secretary of State and did so only occasionally and without system. Thus, the judge for Pennsylvania wrote on December 12, 1791, recommending the pardon of William Jones; on December 24, 1812, the judge for Massachusetts inclosed a copy of the evidence presented in the trial of Samuel Tully and John Dalton for piracy; the judge for Maryland on November 9, 1790, introduced Joseph Clark, who had plans for laying out a federal city.[27] Most of the judges did not write to the Department on official matters connected with their duties at all. It was not until the creation of the Department of Justice in 1870 that the marshals and attorneys ceased to report to the Department of State.

By executive order of President Cleveland, June 16, 1893, the making out of pardons for persons convicted of crimes against the laws of the United States was transferred to the Department of Justice, the order reading:

> I hereby direct that all warrants of pardons and commutations of sentences heretofore prepared at the Department of State on the requisition of the Attorney General, be prepared and recorded in the Department of Justice under the seal of that Department and countersigned by the Attorney General.
>
> GROVER CLEVELAND.
>
> Executive Mansion,
> WASHINGTON, *June 16, 1893.*[28]

This marked the termination of the Department's connection with executive pardons. Up to 1850 all the petitions for pardon had been received by the Secretary of State, and he had examined them and made recommendations which the Attorney-General participated in, when the papers were sent to the President for his decision whether

[27] The letters may be found under their respective dates in the Department of State MSS., Miscellaneous Letters.

[28] Department of State MSS., Miscellaneous Letters.

or not a warrant for pardon should issue. In 1850 the President directed that the petitions be sent to the Attorney-General and thereafter his was the chief agency in the matter. Many of the papers were still, however, sent to the Secretary of State, until the formation of the Department of Justice in 1870. Thereafter, until Mr. Cleveland's order cited above, the Department of State merely acted in an administrative capacity for the Department of Justice. Upon requisition of the Attorney-General the warrants were written in the Department of State and sent to the President for his signature, being afterwards countersigned by the Secretary of State and the great seal affixed, when the warrant was sent to the Department of Justice.[29]

The supervision of territorial affairs also fell to the Department, there being no other superintendence provided by law. The "Territory of the United States Northwest of the River Ohio" was organized by the ordinance of July 13, 1787,[30] and the governor sent reports of his proceedings to congress from whom he also took instructions. The form of government of the territory was continued by the act of August 7, 1789,[31] the reports to be made to the President, who was also given the power to appoint territorial officers. The method pursued is indicated by the following:

Territory of the United States
Northwest of the Ohio.
MARIETTA *the 15th of January, 1789.*

Sir

Six months having elapsed since the Commencement of Government in this Territory it becomes incumbent upon me to make to you any Official Communication agreeably to the Resolves of the honorable Congress. And I do myself the honour of transmitting to you by this opportunity authentic Copies of all Laws, Acts and Public Records from the 9th of July 1788 to the 1st of December inclusive.

I conceive it also my Duty to announce to you the Death of the honourable Judge Varnum, who departed this Life on the 6th Instant, much lamented by all his Friends. On the 13th he was buried with military honours & every attention & mark of Respect.

[29] See for the history of the Department of Justice, "The Department of Justice; its History and Functions," by James S. Easby-Smith, Washington, 1904.

[30] I Stat. 51 n.

[31] *Id.*, 50.

Very many of the Indian Chiefs were of the Procession & conducted themselves with all the Decency of a civilized People.

I have the honor &c.
WINTHROP SARGENT.

CHARLES THOMPSON, Esq.

This is indorsed: "Aug. 35th, 1789, transmitted a copy of this letter and the original papers enclosed to the President of the U. S., R. Alden." [32]

In this case it will be observed the Secretary of the Territory was not advised of the new authority. After it was known to him he directed his communications to the President, to whom he sent full reports of all territorial acts and transactions, also asking for directions when he needed them.

VINCENNES *29th July 1790*

Sir

Mr. Joseph St. Marie a citizen of Vincennes of good Character, has made Representation to me of a Seizure upon his Property by an officer of his Catholic Majesty, and within what is understood to be the Territory of the United States — which I beg leave to lay before your Excellency.

With very great respect &c.
WINTHROP SARGENT

THE PRESIDENT OF THE UNITED STATES.[33]

All of these papers were sent to the Secretary of State and he executed the President's directions with reference to them.

In 1790 (act of May 26) [34] the Territory Southwest of the River Ohio was created under substantially the same system at the northwest territory, and the Secretary of State sent the commission to William Blount, the first governor, who reported directly to him.

Territory of the United States of
America South of the river Ohio.
at William Cobbs, *Feby. 17th 1791.*

Sir,

I had the honor to receive on the first instant a copy of the acts of the Second Session of Congress addressed to me from your office. I have now the honor to inform you that in December I appointed and commissioned the necessary officers both civil and military in the counties of

[32] Department of State MSS., Papers and Records of the Territories, I.
[33] *Id.*, I.
[34] I Stat. 123.

Davidson, Sumner and Tennessee, which form the District of Mero. The people of that district also appeared much pleased with the change of government.

The Superior court for the District of Washington is now sitting, Judges Campbell and McNairy are present. Whether Mr. Perry accepts of his appointment or not, I am uninformed.

I am sir &c,
Wm Blount.

THOMAS JEFFERSON Esquire
Secretary of State.[35]

Another letter from Blount, dated July 17, 1791, shows that the Secretary of State had instructed him with reference to the census.

I had the honor to receive your letter of the 12th March on the 19th day of May and had before recommended the Census to be taken in every County in the territory by the Captains of militia each to take the numbers within the limits of the district of his Company under the directions of the Respective Colonels, &c.

On December 9, 1791, he asked for instructions relative to claiming for the United States the lands between the lines run by the Virginia and North Carolina commissioners.[36]

When Louisiana was bought the reports from the Territory came directly to the Secretary of State.

NEW ORLEANS *Decr 27th 1803*

Sir

Since my last I have been as busily engaged as circumstances would admit, in making such arrangements of this province as I esteemed most consonant to the intentions of the President and the expectations of the inhabitants. The difficulties I met with in this undertaking are peculiarly embarrassing on account of the neglected state in which I found the colony. The functions of government have been nearly at a stand for some time, and considerable arrears of business accumulated in every department.[37]

Governor Claiborne then gave a full account of his proceedings.

As other territories were formed the same methods prevailed. The Secretary of State, under the President, was the fountain head to whom the territorial officers were responsible and he directed their

[35] Department of State MSS., Papers and Records of the Territories, I.

[36] Department of State MSS., Papers and Records of the Territories, I.

[37] Department of State MSS., Governor Claiborne's Correspondence Relative to Louisiana, Vol. I.

conduct. This was the status, until, by act of March 1, 1873, it was ordered:

> That the Secretary of the Interior shall hereafter exercise all the powers and perform all the duties in relation to the Territories of the United States that are now by law or by custom exercised and performed by the Secretary of State.[38]

Similar to the territorial duties but less extensive were those which the Department exercised with reference to the island of Porto Rico, when it passed under American control in consequence of the recent war with Spain. As long as it was under military occupation by the army the supervision was under the War Department, but the act of April 12, 1900, providing a civil government required that the governor should make official report of the transactions of the government to the President, through the Secretary of State, and the governor used the Department of State as a clearing house in his transactions with the federal government. The correspondence was not extensive, however, and the government of the Island was largely independent of the general government. For greater convenience, because the territories were under general supervision of the Interior Department, President Roosevelt required that Porto Rican affairs should pass to the same quarter. The governor still continued, however, to make his reports through the Secretary of State as the law specifically required his doing so, but the act of July 15, 1909, provided that the report of the governor and any other reports required from the officials of the island should be made to such Department as the President might designate, and by an executive order of the same date as the approval of the act he designated the War Department. The connection of the Department of State with the affairs of Porto Rico has, accordingly, entirely ceased.

The management of the sales of public lands, although intimately related to territorial affairs was under the Treasury Department, as it pertained to the revenue of the United States, but the Secretary of State was required by the act of May 18, 1796,[39] (section 7,) to countersign the land patents and record them in his office, and this

[38] XVII Stat. 484.
[39] I Stat. 468.

ministerial duty he continued to perform till the act of April 25, 1812,[40] created the General Land Office in the Treasury Department directing that all duties which the Secretary of State had performed with reference to the public lands be transferred to the new office and all the records also. One clerk, paid $1,400 per annum, who had, as it would appear, had charge of this part of the Department's business, was transferred at the same time.[41] The claims to lands lying south of Tennessee and west of Georgia, known as the "Yazoo lands," were required by the act of March 3, 1803, to be decided upon by boards of commissioners in the territories, and the books and papers on the dissolution of the boards were "to be transmitted to and lodged in the office of the Secretary of State."[42] Accordingly, his office became the depository of the records and the patents were issued and recorded by him. Under section 8 of the act certain lands were set aside to compensate persons for claims to lands received from the state of Georgia, provided the evidence of the claims was presented to the Secretary of State and recorded by him, the claimant paying the clerk employed by the Secretary of State to do the recording twelve and a half cents for every hundred words recorded. The manner of recording is indicated by the following extract:

Admitted to record 18 June 1803. D. B.[43]

This Indenture made the twentieth day of July, in the year of our Lord one thousand seven hundred and ninety eight between ..... of the City of Augusta in the States of Georgia, attorney at Law, of the one part and ..... of the same place merchant of the other. Whereas the Grantees of the Georgia Mississippi Company did lately make a deed unto the said ..... for the purposes and to the effect following, that is to say [follows the deed from the State of Georgia]

And whereas the said ..... is a holder of scrip or Treasury certificates for the subscription of citizens in the said Georgia Mississippi Company's purchase to the amount of one hundred and ten thousand and seventy four acres, now this Indenture witnesseth, etc.[44]

[40] II Stat. 716.

[41] *Id.*, 718.

[42] II Stat. 231.

[43] Daniel Brent, Chief Clerk of the Department.

[44] Department of State MSS., Lands South of Tennessee, vol. 1.

Under section 9 of the act the Secretary of State, Secretary of the Treasury, and Attorney-General were authorized to receive offers of compromise and settlement from companies and persons claiming public lands in the territory in question and report their opinion to congress at the next session. The evidence was received by commissioners acting for the board and a report sent to congress, but thereafter there was no action taken until the act of March 31, 1814,[45] provided that those who had filed the evidence should have till January 1, 1815, to file legal releases to the United States of all their claims. The Department received the releases which are now of record.

The commissioners who were appointed under this act conceived themselves to be appurtenant to the Department as the following letter indicates:

WASHINGTON *March 11th 1815.*

Sir:

The 8th Section of the act of Congress of March 3d 1803 (6 Vol. Laws U. S. p. 282) requiring the evidence of all claims under the act or pretended act of Georgia to be recorded in the Secretary of State's office, a doubt may arise, whether the deeds & documents which have been filed with us, without having been previously deposited in your office could be considered as a compliance with the provisions of the act. We would therefore suggest the propriety of the performance of some act on your part, which would give the evidences of claims filed with us the same effect that they would have if filed previously in your office. A declaration from you that the session chamber of the board of Commissioners shall be deemed a part of your office — or an authority given to a clerk in your office to take possession temporarily of the paper deposited with us, would in our opinion sufficiently answer the provisions of the law. We beg leave to call your attention to this subject, with apologies for this intrusion & are with respect

Yr obt hbe servts
Tho Swann
John Law } Comrs

The Honorable James Monroe.[46]

The certificate given by the state of Georgia surrendered to the Secretary of State was in the following form:

[45] III Stat. 117.

[46] Department of State MSS., Lands South of Tennessee (unbound papers).

(Admitted to record 24 Nov. 1803 .....)

STATE OF GEORGIA. No. 383

In pursuance of an Act of the Legislature of the State aforesaid, passed at Augusta on the seventh day of January, one thousand seven hundred and ninety-five, vesting in the Subscribers a certain tract of Territory of the said State, lying on the Great Bent of the River Tennessee, as fully described in said Act: We hereby certify, That ..... or his Assigns, is entitled to the one four hundred and twentieth part of said Territory; *Provided,* the sum of one four hundred and twentieth part of the full purchase money for said Territory is paid unto ..... or his Agent on or before the first day of August next ensuing, when a Deed of Conveyance will be issued in lieu of this certificate, to the said Act. And in case the said ..... or his assigns, should fail in paying the sum above specified, then this Certificate is declared by the Subscribers to be null and void. Dated at Augusta, this twenty-fifth day of February one thousand seven hundred and ninety-five.

.....

.....

Endorsed:

August 27th February 1795

Received the full consideration for the within, Say the one four hundred and twentieth part of the purchase money as within specified.

.....[47]

The releases made to the United States were regular indentures as follows:

This indenture made this eleventh day of March in the year of our Lord, one thousand eight hundred and fifteen between ..... and ..... of the Town of Abingdon in the County of Washington and State of Virginia by ..... their attorney of the first part and the United States of America of the second part.

Whereas, by an act of the Congress, &c.

Therefore, the parties of the first part conveyed all rights and claims to the parcel of land described to the United States.[48]

The Department's management of affairs which are now under the Treasury Department has not been extensive, that Department having been organized as soon as the Department of State.

Section 4 of the act of March 2, 1819,[49] however, provided that each vessel arriving in the United States must report to the collector

[47] Department of State MSS., Lands, vol. II.

[48] Department of State MSS., Lands South of Tennessee, vol. 9.

[49] III Stat. 489.

of the district in which it arrived a list of all the passengers on the ship, and the collector was required to send quarterly returns of these manifests to the Secretary of State, by whom the statements of passengers thus landed were sent to Congress. This requirement was repeated by section 13 of the act of March 3, 1855,[50] and repealed by the act of May 7, 1874,[51] which provided that the manifests or lists of passengers should be sent to the Secretary of the Treasury. The Secretary of State had carried on direct correspondence with the collectors with reference to the lists and each year had sent them to Congress; his duties went no further.

July 4, 1864,[52] an act was approved to encourage immigration into the United States, and the first section provided that the President should appoint a commissioner of emigration, who should be subject to the direction of the Secretary of State, with a salary of $2,500 per annum and be allowed three clerks. Under him was to be the superintendent of immigration at New York. On the day of the signature of the act James Brown of New York was appointed the commissioner. For four years the Bureau of Immigration continued under the State Department, but by act of March 30, 1868 (section 4),[53] it was abolished and not revived till the act of March 3, 1891,[54] placed it under the Treasury Department, from which it passed to the Department of Commerce and Labor when that department was created.

The Department had the duty of publishing the Biennial Register or Blue Book. It was first authorized by a joint resolution of the Senate and House, approved April 27, 1816,[55] requiring that once in two years a register, containing correct lists of all officers and agents, civil, military and naval in the service of the United States, made up to the last day of September of each year in which a new Congress is to assemble, be compiled and printed under the direction of the Secretary of State. The heads of other departments were

[50] X Stat. 719.
[51] XVIII Stat. 42.
[52] XIII Stat. 385.
[53] XV Stat. 58.
[54] XXVI Stat. 1084.
[55] III Stat. 342.

ordered to lodge their lists with him in due season, and the Secretary of the Navy to include the names, force, and condition, of all ships and vessels belonging to the United States. Five hundred copies of the Register were to be printed, and on the first Monday in January in each year when a new Congress assembled, the copies were to be distributed among the higher officers of the government, and twenty-five copies lodged in the library of the United States.

The publication continued on this system until it was modified by the joint resolution, approved July 14, 1832,[56] which required the inclusion of a list of all printers of the laws of the United States, with the compensation allowed each one, and of all printers in any way employed by Congress, by any department or officer of the government, with the compensation, and all allowances made by the Postmaster-General within the same period — 30 September, 1831, to 30 September, 1833 — to each contractor on contracts for carrying the mails; a list of the president, cashiers, and directors of the Bank of the United States and its branches. In collecting the information the Department sent a circular to those whose duty it was to furnish it. It merely assembled the data and published it, but the labor involved became considerable as the force of the government grew larger. By act of February 20, 1861, the duty was transferred to the Department of the Interior.[57]

GAILLARD HUNT.

[The balance of this section dealing with Occasional Duties of the Department will appear in a future issue of the JOURNAL.]

[56] IV Stat. 608.
[57] XII Stat. 141.

ARCTIC EXPLORATION AND INTERNATIONAL LAW

The announcement on September 1, 1909, by Dr. Frederick A. Cook, that he had discovered the north pole on April 21, 1908, and the almost contemporary declaration on September 6th, of Robert A. Peary, of the United States Navy, in command of the *Roosevelt*, that he had discovered the north pole on April 6, 1909, are, if substantiated, not only international events and scientific achievements of the greatest interest and value, but the culmination of centuries of effort, directed not merely to reach the pole, but to shorten commercial routes by the discovery of a northwestern and northeastern passage, to advance our knowledge of arctic geography and to make known in a disinterested and scientific spirit, the flora, fauna, and the physical configuration of the arctic regions.

Less interesting, perhaps, but not without value, is the discussion of the title to the vast regions discovered and explored, and the principles of law supposed to be involved in the claims which either may be or have been made to the ownership of the regions thus discovered. In view of the inherent interest of the subject, the heroism of the achievement, and the principles of international law involved in the acquisition of territory, it seems not inappropriate to consider in summary form certain phases of arctic exploration.

Arctic explorations may conveniently be divided into three classes: first, the voyages for the discovery of a northern passage to the west or to the east; second, purely scientific expeditions for the advancement of geographical knowledge; third, polar expeditions properly so-called, for the actual discovery and location of the pole.

For the purpose of this article the early expeditions which opened up Iceland and Greenland may be disregarded, just as the predecessors of Columbus are ordinarily passed over in considering the discovery of America, because, however important one or the other may have been, the expedition of Columbus to discover a passage to India opened up a new and unsuspected world and supplied at once the impetus and incentive to the adventurous of all countries to

set sail for the unknown lands, the knowledge of whose existence was due to the persistent energy, personal sacrifice, and unconquerable faith of the great discoverer. Whatever scientific purpose Columbus may have had in mind, his enterprise was primarily commercial. To the enlightened Isabella and the astute Ferdinand he displayed visions of territorial expansion and commercial gain. For the painful and expensive routes by land to Cathay and the fabulous East, simple and direct communication by water was to be substituted, and the boundless and inexhaustible treasures of the land of dreams were to be poured into the lap of Spain.

The jarring claims of rival adventurers and discoverers led inevitably to conflict and controversy. The universally recognized authority of the Pope, for Protestantism had not yet threatened his supremacy, made him a natural arbitrator, and Spain and Portugal laid before him for amicable settlement their claims to the unknown world based upon discovery and by a Bull as famous as it is universally discredited at the present day, Alexander VI drew an imaginary line from pole to pole, awarding the lands on one side to Spain, on the other to Portugal. The successful rounding of the Cape of Good Hope by Vasco da Gama in 1497 closed the waterway to other than Portuguese adventurers. The claims of Spain to the vast tracts of America to the south, based upon discovery, and followed by a more or less effective occupation, closed the south to European navigation. The adventurous turned to the north, and in 1497 Cabot proposed a northwest passage to the Indies, so that England at least might participate in the spoils of the East. As General Greely puts it in his admirable and authoritative handbook,

> The discovery of the continent of America and the search for a northwest passage are inseparably connected, the first event having directly resulted from the latter pursuit. The idea of such a passage originated with John and Sebastian Cabot, father and son.[1]

But Cabot was not content with proposing, he sought to execute his project and in the year 1498 he coasted, to quote General Greely,

[1] A Handbook of Polar Discoveries, by A. W. Greely, U. S. A., 3rd edition, 1906, p. 12.

Along the American continent northward to about 67° 30′ N., doubtless discovering the mouth of Hudson Strait — where appalling dangers and abundant ice obliged him to retrace his way southward, until he reached the vicinity of the 38th parallel — still searching for a passage as far as "that part of the firme lande, now called Florida." Thus from the venture on the passage resulted a knowledge of some 1800 miles of American seacoast. While the explorations thus made disclosed the existence of a great continenet as an inseparable barrier to voyageurs for China, it incidentally gave such an accurate knowledge of America as led to unexpected advantages in later voyages, enabling explorers to have more specific aims and definite destinations.[2]

Of the innumerable successors of Cabot it is only possible, within the compass of a few pages to indicate the expeditions of pioneer explorers who by a concensus of opinion have opened the way to the northwest passage. In the early period, therefore, only three expeditions will be considered, but, however modest their equipment, they not only pointed the way to the passage but for two centuries registered the greatest advance made in America toward the pole. The first of the trio was John Davis, who in his three voyages to the northwest sighted and described Greenland, — "the loathsome view" of whose shore "and irksome noyse of the yce was such as to breed strange conceites among us," — crossed the strait which bears his name, and which is not merely the entry to the northwest passage but to the polar expeditions properly so-called, pushed up to 72° 12′ N., and "covered the west coast of Greenland from Cape Farewell to Sanderson's Hope, and on the American side from Cape Dyer, Cumberland Island, to Southern Labrador."[3]

Henry Hudson, known for his discoveries in Spitzbergen and Nova Zembla (1607–9), and of the noble river within our country which perpetuates his name, entered the straits and found his death in the bay which also bears his name, while seeking the northwest passage (1610). The four years of Hudson's life for which we have record run from 1607–1611, but in Spitzbergen he opened up the whale fishery, gave England title to Hudson Bay and its territory rich in furs, and the Dutch their claim to New Netherlands by the discovery of Hudson River.

[2] *Ib.*, pp. 12–13.
[3] *Ib.*, pp. 15–16.

In 1616 William Baffin in the *Discovery*, a craft of fifty-five tons, sailed through Davis strait and the bay since known as Baffins Bay, and reached latitude 77° 45′ north, a record unequalled in that sea, as General Greely says, for two hundred and thirty-six years. He penetrated over three hundred miles farther north than Davis and added

> To geographical knowledge Ellesmere and Prudhoe Lands, and Baffin Bay, with its radiating sounds of Smith, Jones, and Lancaster. With this voyage ended all efforts to discover a route to Cathay and the Indies by Davis Strait; "for two centuries the waters first navigated by Baffin remained unvexed by any keel, and the credit of his discoveries passed from the mind of man."[4]

The various expeditions to America and the search for a northwest passage were made by professional navigators to find a channel for commerce. The rebirth of arctic exploration and the western passage was due to a professional merchant-man, William Scoresby, who in the pursuit of whale-fishing made scientific discoveries and observations of the greatest value on the coast of Greenland, and influenced by scientific as well as commercial motives proposed in 1817 to Sir Joseph Banks, president of the Royal Society of London "researches toward deciding whether or not a navigation into the Pacific by a northeast or northwest passage existed."[5] Fortunately for the cause of science Mr. (later Sir) John Barrow was then secretary of the admiralty and acting upon his advice the British government fitted out a series of expeditions both for the discovery of the northwest passage and the location of the pole. The land expeditions under Franklin, Richardson and Back, resulted in mapping a large portion of the northern continent of America; the expedition under Ross (1818) was a disappointment, but Parry entering Lancaster Sound, pushed as far west as longitude 113° 48′, made known the series of islands far to the west which bear his name, and as the result of his experience, to quote again General Greely,

> formulated the well-known canons regarding ice-navigation, which time and experience have only tended to confirm. He says: "The eastern coast of any portion of land, or, what is the same thing, the western

[4] *Ib.*, p. 21.
[5] *Ib.*, pp. 85–86.

sides of seas or inlets having a tendency at all approaching north and south, are, at a given season of the year, generally more encumbered with ice than the shores with an opposite aspect." Ships, he adds, should be kept disengaged from ice so that they may be at liberty to take advantage of the occasional openings in-shore, by which alone the navigation of these seas is to be performed with any degree of certainty.[6]

A private expedition (1829–34) under the command of Captain John Ross and his nephew James C. Ross, located the magnetic pole.[7]

Just as the agitation of the Royal Society of London, seconded as it was by Sir John Barrow, led to the remarkable explorations of the early part of the century, so the insistence of the Royal Geographical Society persuaded the British government to undertake anew the search for the northwest passage. Sir John Franklin had won enviable distinction and showed the highest qualities as a scientific explorer in his land expeditions across the northern shores of the American continent and, notwithstanding the objection to him on the score of age — the First Lord of the Admiralty pointed out to him that he was sixty years of age, to which Franklin eagerly answered: "No, no, my Lord, only fifty-nine," — he was entrusted in 1846 with the command of the expedition, consisting of the *Erebus* and *Terror,* in order to make the northwest passage. The fate of the unfortunate expedition is known, even to the uninitiated, but, although Franklin did not cross from sea to sea, it is nevertheless a fact that his expedition, sailing through Lancaster Sound to the west, proceeded through Peel Straight to the south and entered the waters of the connecting channel between the east and the west. Sir John Franklin died (June 11, 1847) before the wrecking of the expedition upon which his hopes were set and every man of the expedition lies in an unknown arctic grave; but "they fell down and died as they walked," and, as Sir John Richardson so beautifully says, "forged the last link of the northwest passage with their lives."[8]

[6] *Ib.*, p. 94.

[7] "The most important work done by James Clark Ross, giving imperishable renown to his name, was the determination of the position of the north magnetic pole, which his observations placed at Cape Adelaide, on the west coast of Boothia Felix, in latitude 70° 05′ N., longitude 96° 44′ W. Parry at Port Bowen located it in 70° 43′ N., 98° 54′ W. Amundsen relocated it near King William Land in 1904." *Ib.*, p. 97.

[8] *Ib.*, p. 133.

However unsuccessful the venture may have been, the consequences have made it justly the most famous in the annals of arctic explorations, because the numerous relief expeditions, some forty in number, fitted out between 1847 and 1857 by the Government of Great Britain and by private enterprise in England and the United States, have traced the northern boundary of the Western Hemisphere from sea to sea, have examined the islands, bays, inlets and straits to the north of the continent within the region of the passage and enabled McClure, partly by water and partly by land, to cross the narrow space of fifty-seven miles which separated the known east from the known west, thus accomplishing the purpose for which the original expedition embarked.

Amundsen's expedition of 1905 demonstrated the possibility of crossing the passage by boat as McClure had previously proved its existence, but it is to be feared that geography rather than commerce will reap the benefit of centuries of heroic effort and enterprise.

Commercialism, which lay at the bottom of the search for a northwest passage to the Indies inspired the expeditions to reach Cathay and the Indies by a northeastern route. Omitting the efforts of the early Norse and Russian seamen, to whom the eastern part of the passage must have been known, the first extended venture through unknown seas was the expedition of Sir Hugh Willoughby and Richard Chancellor, in three small ships, which left England in 1553. Wholly unsuccessful, Willoughby and his companions perished from scurvy, but Chancellor, animated by the desire to "either bring that to passe which was intended, or else to die the death," entered the White Sea, was hospitably received by a monastry on the Dwina and made his way to Moscow, where he passed the winter. The expedition, devoid of geographical or scientific results, laid the foundation of a large and very lucrative British trade under the control of the Muscovy company, organized in 1555. As said by Nordenskiöld — the most scientific explorer and perhaps the best equipped mentally of arctic investigators — to whom the world owes the actual transit through the northeast passage:

> Incalculable was the influence which the voyages of Willoughby and Chancellor had upon English commerce and on the development of the

whole of Russia, and of the north of Norway. From the monastery at the mouth of the Dwina a flourishing commercial town (Archangel) has arisen, and a numerous population has settled on the coast of the Polar Sea. * * * Regular steam communication has commenced along the Arctic Ocean far beyond the sea opened by Chancellor to the world's commerce.[9]

The successful resistance of the Netherlands to Spanish aggression enabled the United Provinces to husband their resources at home and to obtain commercial markets upon the high seas. The preponderance of Spain and Portugal in the south limited the Dutch to the north and therefore impelled by like motives with the English, they sought the route to Cathay by the north of Europe and Asia. Unsuccessful in their purpose, the expeditions under William Barents, (1594) Ryp, and Heemskerck (1596), with Barents as chief pilot, opened up Spitzbergen and Nova Zembla, and afforded the world a noble example of heroism and self-sacrifice in the devoted death of William Barents.

Of Barents' voyages General Greely says, quoting Beke,

> Barents made so many discoveries and traced so large an extent of coast, both of Spitzbergen and Nova Zembla, that the surveys of all of the whole of our recent explorers (1853), put together, are insufficient to identify all the points visited by him.[10]

As in the case of the northwest passage, the successful expedition of Baffin was followed by two centuries of inactivity, so Barents remained for well-nigh two centuries without a competent successor. Numerous valuable expeditions were made to Nova Zembla, and Spitzbergen, and the geography of northern and western Europe was laid down by navigators and scientists, but it was only in 1875 that the question of the northeast passage was revived and executed by Nordenskiöld, who in the *Vega* reached Behring Sea by the northeastern passage in its memorable voyage (1878–1879) and thus demonstrated the possibility not only of the passage but the usefulness of the route during certain portions of the year as a channel of commerce.

[9] *Ib.*, p. 36.
[10] *Ib.*, p. 28.

The importance of scientific research in the Arctic regions has been more or less appreciated since the early days of the 19th century. Only within the last 30 years, however, have the natural sciences been fully represented on polar voyages, and valuable as were the former individual contributions, yet they were restricted and inconclusive. A revolution was wrought in this direction through the efforts of Lieutenant Charles Weyprecht, Austrian navy, which eventuated in the establishment of the International Circumpolar stations.[11]

On September 18, 1875, Lieutenant Weyprecht, one of the discoverers of Franz-Josef Land, to quote the language of Sir Clement R. Markman,

read a thoughtful and carefully prepared paper before a large meeting of German naturalists at Gratz on the scientific results to be obtained from polar research and the best means of securing them. He urged the importance of establishing a number of stations within or near the Arctic Circle, in order to record complete series of synchronous meteorological and magnetic observations.[12]

The remarks of Lieutenant Weyprecht have, fortunately, obtained a wider hearing than the little group to which they were addressed and have resulted in the establishment of various circumpolar stations which have sent forth no less than fifteen expeditions, the most interesting of which, to the American reader, is Lieutenant Greely's expedition of 1882–1885. There is no doubt that the truly permanent value of arctic explorations does not lie in the success or failure of the explorer, and while we may and do admire the heroism displayed, whether the important object of the explorer has been accomplished or not, the permanent value of the expedition is determined by the positive addition it makes to scientific knowledge, for, as Lieutenant Weyprecht clearly stated,

(1) Arctic research is of the highest importance for a knowledge of nature's laws; (2) geographic research is valuable in proportion as it opens the field to scientific research generally; (3) the north pole has, for science, no greater significance than any other point in the higher latitudes.[13]

It is safe to say that the future lies with scientific explorations, and the fitting out and adequate equipment of expeditions for a purely

[11] *Ib.*, p. 221.

[12] Clement R. Markman, Ency. Brit., 9th Ed., vol. 19, p. 326.

[13] *Ib.*, p. 327.

scientific purpose rather than for the gratification of the personal ambitions of individual explorers, and that in the course of time the plan outlined by Lieutenant Weyprecht will, if carried out, remove the mystery which heretofore has surrounded the extreme northern and southern portions of the world.

As briefly stated in this article, arctic explorations have been made the advance guard of commerce, and the earliest expeditions whether to the east or to the west were for a purely commercial purpose, namely, to discover a short route for commercial purposes to China, Japan, or the Indies. It was not until the revival in arctic exploration, due to the efforts of the British whaler, Scoresby, that the attempt to reach the pole was seriously contemplated. In 1827 Parry, seasoned by four arctic expeditions, attempted to reach the pole by the Spitzbergen route, and reached the latitude of 82° 45′ N., the record for the next forty-eight years. The voyages of the Americans Kane (1853) and Hayes (1859) were not, according to General Greely, "open attempts to reach the north pole, though incidentally the leaders looked in that direction."

The polar expedition of Nordenskiöld in the *Sofia* reached 81° 42′ N., 17° 30′ E. Although unsuccessful in reaching the pole, Nordenskiöld, scientifically equipped, and a scientist by profession, made such valuable collections that it is said he achieved more and broadened the horizon of knowledge more than if he had merely reached the pole. An expedition sent out by the United States government in 1870 commanded by Charles Francis Hall reached 82° 11′ N., then the highest north, but was surpassed in 1876 by the British official expedition under Captains Nares and Markham in the western hemisphere and by Nansen in the eastern hemisphere. In 1901 the Duke of the Abruzzi reached 86° 34′ N. by way of Franz-Josef's Land. In 1906 Peary made 87° 6′ N. In summing up his chapter on north polar voyages General Greely says that,

> England held the honors of the farthest north through Hudson, 1607; Phipps, 1773; Parry, 1827; Nares, (by Aldrich on land) 1875, and (by Markham on sea) 1876. This record, unbroken for 275 years, passed to the United States by the International Polar Expedition commanded by Greely, Lockwood, and Brainard, reaching 83° 24′ N. on land and sea. Nansen gained the honor in 1895, 86° 05′ N. on the ocean, to yield

it to Abruzzi, whose assistant Cagni reached 86° 34′ N., in 1902, the highest of today. Greely's record of land was exceeded 16 miles by Peary in 1900, who yet holds that record.[14]

Supposing that both Dr. Cook and Commander Peary have reached the north pole the possibility of reaching it has thus been demonstrated, and it must be a subject of congratulation to our people that the prize so long and so eagerly battled for has been won, and that the glory of the achievement belongs to the United States.

In speaking of the elements which enter into polar explorations Sir John Franklin said:

> Arctic discovery has been fostered from motives as disinterested as they are enlightened; not from any prospect of immediate benefit, but from a steady view to the acquirement of useful knowledge and the extension of the bounds of science; and its contributions to natural history and science have excited a general interest. The loss of life in the prosecution of these discoveries does not exceed the average deaths in the same population at home.[15]

It cannot be doubted that the commercial element first prompted arctic exploration and the material profits have been almost incalculable. For example, we know that the Hudson Bay Company found the fur trade in the region watered by the bay which Hudson discovered an inexhaustible mine of wealth; that another of Hudson's voyages gave rise to the Spitzbergen whale fishery, from which alone during one hundred and ten years (1668–1778) Holland drew products valued at one hundred millions of dollars. And General Greely asserts that "it may be assumed that in a little over two centuries the arctic regions have furnished to the civilized world products aggregating a thousand millions of dollars in value."[16] If considered, therefore, from the standpoint of adventure, arctic exploration records some of the noblest instances of disinterested heroism, devotion, and daring. If viewed from the material standpoint, the results of the explorations have been highly profitable to industry and commerce, but from another standpoint arctic explorations have amply justified the losses of life and property sacrificed in

[14] Greely, *op. cit.*, p. 182.
[15] *Ib.*, p. 7.
[16] *Ib.*, p. 9.

their pursuit. In speaking of their contribution to the world's knowledge, General Greely has finely said:

> From the voyages under consideration the contributions to material interests and to the sum of human knowledge have been neither scanty nor inconsiderable. The air, the earth, the ocean, even the universe, have disclosed some of their rarest secrets to scientific voyagers in polar lands. Within the Arctic Circle have been located and determined the poles of the triple magnetic forces. In its barometric pressures, with their regular phases, have been found the dominating causes that affect the climates of the northern parts of America, Asia, and Europe. From its sea-soundings, serial temperatures, and hydrographic surveys have been evolved the most satisfactory theory of a vertical interoceanic circulation. A handful of its dried plants enabled a botanist to prophetically forecast the general character of unknown lands, and in its fossil plants another scientist has read unerringly the story of tremendous climatic changes that have metamorphosed the face of the earth. Its peculiar tides have indicated clearly the influence exerted by the stellar worlds on our own, and to its ice-clad lands science inquiringly turns for data to solve the glacial riddles of lower latitudes.[17]

The announcements of the discovery of the pole by Dr. Cook and Commander Peary have aroused much discussion in the press as to the title acquired by discovery. In considering this interesting question[18] it must be borne in mind that title by discovery applies to land, not to water, for it cannot be maintained that the discovery of an open sea conveys ownership of the water or indeed to the lands washed by it, as it is universally held that the open seas, beyond the limit of territorial waters, are insusceptible of appropriation. In like manner, it would not be asserted that the discovery of an iceberg or a floating field of ice conveyed title to the land upon which the iceberg happened to rest, or in whose neighborhood it floated to the sea. In the technical sense, the conveyance of water within defined limits would not transfer the land covered by it, whereas the conveyance of the land covered by the water would pass title to the land as covered by the water. Therefore, we may eliminate from

[17] *Ib.*, p. 8.

[18] The reader interested in the legal aspect of discovery and occupation is referred to Hall's International Law, 5th ed., pages 100–118; Oppenheim's International Law, I:275, 283, and authorities there cited; Moore's International Law Digest, I:258 *et seq.*

consideration polar discoveries disconnected with land, unless we are prepared to insist that a different law obtains in the arctic regions and that icebergs and ice-floes may not only be acquired but pass title to adjoining land.

It is true that the discovery of rivers gives title to the lands washed by them, but that is because of the necessary and close connection between the land and the water, and the evident intent of the discoverers to annex the land, using the water only as a means of identification. Discovery of unoccupied land may be wholly irrespective of subsequent occupation, or it may be with intent to occupy. In the centuries immediately following the discovery of America, title was claimed by mere discovery, and the early charters of some of our states bear out the statement that little or no limit was placed upon the title so acquired provided the power felt itself strong enough to enforce the claim, however exaggerated it might be. While international law does not seek to undo the past, it gives no countenance whatever to the claim that mere discovery alone and by itself vests title. At most discovery creates a presumption, an inchoate right, which followed by occupation ripens into title. The time within which occupation should follow depends necessarily upon the circumstances of each particular case; but while discovery may give priority to the discoverer, and permit him to reduce the discovery to possession by actual occupation, a failure to occupy, within what may be considered in view of all the circumstances a reasonable time, will undoubtedly be regarded as a renunciation of the original priority and the right springing from it. In the next place, discovery within the contemplation of international law, is a political or sovereign act, and to be the source of right should be made by a navigator duly commissioned by the authority of the state in whose behalf he acts. It is not asserted that a sovereign could not subsequently ratify the act of one in its employ, although he was not specifically commissioned for the specific act, but the intent of the sovereign should be manifested either at the time or subsequently in unmistakeable terms so that the act of the individual becomes the act of the state. Discoveries due to private initiative do not of themselves convey rights, for as a private citizen or a commercial company which he repre-

sents is not a sovereign body neither he nor it, through him, can acquire the incidents of sovereignty. It would appear therefore that private expeditions do not acquire title to the land discovered either for themselves or for the country of which they happen to be the subjects or citizens, a fact recognized by the Dominion of Canada which is said to have recently fitted out an expedition formally to take possession of the islands in the Arctic Ocean adjoining the Dominion of Canada. Discovery within the arctic regions has undoubtedly vested title, but that is because the expeditions were under state control and discovery was followed not merely by a claim of sovereignty but reduced by actual possession to title. Thus Iceland and Greenland have been and are Danish colonies. The territory watered by Hudson Bay passed into possession of Great Britain and was administered as British territory by British officials until it was incorporated in 1870 into the Dominion of Canada. The discovery of Tasmania and Australia are examples not exceptions to the general rule, and Great Britain claims sovereignty over these territories not by discovery but by effectual occupation. The unsatisfactory working of the claim that discovery vests title has led to a solemn agreement of the powers interested in Africa that occupation should follow discovery in order to vest title, and that even the intent to occupy should be notified, thereby reducing to the minimum the possibility of international controversy arising out of the efforts of over-zealous explorers and settlers.

There is, however, great difficulty in applying the present theory and practice of discovery and occupation to the arctic regions even supposing that the general principles can be considered as universally accepted, for arctic expeditions are usually voyages of discovery in which there is no present or future intent to annex the territory actually discovered. They are undertaken with a scientific not with a political intent, although it would be eminently proper for an expedition to be fitted out under the control of a state official for the express purpose of annexing any and all lands to be discovered. Supposing that Dr. Cook reached the north pole it is difficult to see how the United States acquires any title to the polar regions, and even supposing that Commander Peary, an officer of the United

States navy, had been specifically detailed to reach the pole, his expedition was it would seem one of adventure and scientific discovery not undertaken for the purpose of extending the sovereignty of the United States to the polar regions.

The justness and applicability of these observations will appear more clearly by a brief consideration of the Spitzbergen archipelago. Various nationalities have vied with each other in discovering and making known Spitzbergen. From the date of its discovery by Barents, its circumnavigation by Carlsen (1863), and its scientific exploration by Nordenskiöld, the claim of Norway and Sweden to sovereignty over the island has been urged, but this met in 1871 with the outspoken opposition of Russia, and in 1872 the two governments agreed formally that the region should remain as it had been, no man's land (*terra nullius*). The recent separation of Norway from Sweden has added a further element of complication, because the subjects of Norway claim a peculiar and preponderating interest in the islands by reason of the fact that the Norwegians may be said to be the only people who resort to them in considerable numbers. Certain coal-fields in the islands are worked by a British corporation, and an American company is at present exploiting coal in Spitzbergen. Therefore if Spitzbergen, notwithstanding discovery, occupation and the assumption of sovereignty by Sweden, is considered no man's land, it must be by reason of the fact that the voyages of discovery and the explorations made in the islands during the past two centuries were scientific, undertaken without the intent of passing title. To remedy this state of affairs, to protect the interests of various nationalities in Spitzbergen, and to secure life and property by the administration of justice, Norway has recently called an international conference of the powers interested in Spitzbergen to meet at Christiania (1910) in order to establish a system of administration, without, however, appropriating the islands to any one of the participating powers or changing the status as *terra nullius*. It would therefore appear that arctic discovery as such vests no title, and that the arctic regions, except and in so far as they have been occupied, are in the condition of Spitzbergen, that is to say, no man's land.

JAMES BROWN SCOTT.

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LAWYER-SECRETARIES OF FOREIGN RELATIONS OF THE UNITED STATES

The appointment of the Honorable Philander Chase Knox as Secretary of State is a subject of congratulation to those who believe that legal training and active practice at the bar or experience upon the bench are either essential to, or the best preparation for the conduct of the foreign relations of the United States. A successful business career to which is added experience in public life no doubt enables a secretary to administer his office acceptably; a knowledge of foreign relations, a high sense of justice, a willingness to see both sides of the question, and to weigh the comparative advantage and disadvantage of a proposed policy go far to settle satisfactorily a controversy; and grace and ease in discussion and skill in handling an antagonist will enable their fortunate possessor to uphold the dignity of his office and safeguard the interests of his country. But when we consider that a legal question is frequently involved in the

simplest diplomatic transaction, it is at once seen how useful a legal training must be in the negotiator, and if we consider that the foreign relations of nations are based upon international law and that the so-called law of nations is at once the source and the measure of international right and duty, we are forced to the conclusion that a knowledge of international law as a system, and a training in legal procedure and interpretation are wellnigh indispensable to the secretary of state. Whatever doubts there may be as to the legal nature of international law and its position in our system of jurisprudence are set at rest by the practice of the United States and the decisions of its Supreme Court which has declared international law to form an integral part of our law (*Paquette Habana*, 1899, 175 U. S. 677). The foreign policy of the United States must be in accordance with the laws of the United States, and as international law is an integral part of our jurisprudence, recognized and applied as such by the courts of the country in any and every case involving a question of international law, it follows that the foreign policy of the United States in so far as it involves a question of law, rather than courtesy and comity, must be based upon international law, and it needs no argument to assert that the secretary of state who has had legal training and experience possesses an incalculable advantage over the layman, who has to rely and act upon the advice of a subordinate who does not and can not well have the experience, the mental attainments, and equipment of his chief.

It is often made a matter of reproach or criticism that our secretaries of state have not had diplomatic experience, and that they have not always been interested in matters of foreign policy before their appointment; but the fact is overlooked that where diplomatic experience and familiarity with foreign questions are lacking, the secretary has had a legal training which enables him readily to grasp the controversy, to separate it into its component parts and apply to it, with ease and certainty, the proper and controlling principle of law. The principles of international law are few in number, though their application is various, and a lawyer readily applies them to the concrete case. The lawyer's attitude is perforce different from the layman's, and, it is submitted, superior. No better or more telling illustration of the superiority of the technical to the lay mind can be found than that afforded by the negotiation of the treaty of 1783 in which Jay and Dr. Franklin took part. Great Britain wished to treat with the colonies as such and grant in the treaty of peace, their independence. Dr. Franklin was willing to

conclude such a treaty. Not so Jay; trained in the law, ripened in its practice, and first chief justice of the state of New York, he maintained, and rightly, that the United States were not treating for their independence; that they had obtained it by force of arms, and that Great Britain should and must recognize in advance this independence, else the two contracting parties would not stand upon an equality, and Great Britain might make the grant depend upon conditions unacceptable or displeasing to the United States. The importance and propriety of Jay's view, which prevailed, is so evident as to need neither argument nor illustration. In noting the difference of views, Dr. Franklin stated that Jay was a lawyer and often thought of things that did not occur to a layman. On Dr. Franklin's statement the lawyer is the safer if not the better man, and the experience of the Department of State shows that secretaries with legal training and experience have been the most successful.

For example, the secretaries of the Revolutionary period and under the Confederation were lawyers of standing and position. The first secretary, Robert R. Livingston, was chancellor of the state of New York. John Jay, his immediate successor, was chief justice of the same state and later Chief Justice of the United States, to whose lot it fell as minister to Great Britain at a critical time to negotiate a treaty which introduced arbitration of international controversies into international relations. Reference is made to articles 5, 6, and 7 of the so-called "Jay Treaty" of November 19, 1794; and the commission organized under article 7 is always looked to as a model and considered the classical example of the judicial settlement of international disputes by means of a mixed commission. (*See* de Lapradelle et Politis: *Recueil des Arbitrages Internationaux,* vol. 1, pp. xxix *et seq.*). The first secretary of state under the Constitution, Thomas Jefferson, was a lawyer of training, ripened by political experience, and Franklin's successor in the French mission. His services to the law of neutrality in which, however, Hamilton had a large share, are universally recognized, by no one more ungrudgingly than the late W. E. Hall, who was no lover of the United States. James Madison was likewise a profound jurist to whom we owe in no small measure the present Constitution of the United States, and John Quincy Adams, whom no less a judge than the Honorable John W. Foster considers our most accomplished secretary of state, was not merely a lawyer before his acceptance of the secretaryship, but returned to the practice of law after his presidency. Lest this enumeration grow wearisome a few of the

later secretaries of distinction will be mentioned as showing the advantage of legal training and experience. That Webster was one of the most distinguished secretaries of state is as well known and admitted as his headship of the American bar. Marcy, secretary under the forgotten Peirce, was not only an able lawyer but at one time an admirable judge of the State of New York. Seward had had legal training and shows it in many of his dispatches, and Hamilton Fish, one of the most accomplished and soundest secretaries, was a lawyer by profession. William M. Evarts had been attorney-general before becoming secretary of state. Messrs. Frelinghuysen and Bayard were lawyers. John W. Foster practiced law before entering the diplomatic service and returned to it after his secretaryship, which was unfortunately too brief for the country to appreciate his merits at their full worth. Richard Olney passed from the attorney-generalship to the Department of State. Mr. Hay though not distinguished at the bar, enjoyed a legal training, and his successor, the late Secretary Root, was a leader at the bar as long as he cared to practice.

The selection of Mr. Knox by our lawyer President is in line with the best traditions of the office, and Mr. Knox's experience as Attorney-General, and in the senate will be turned to good account in the conduct of the foreign relations of the United States. The development of international law as far as we are concerned is intrusted to the secretary of state, and international law and its future are safe in his skillful and trained hands. Mr. Knox is a lawyer of the lawyers, who would have graced the Supreme Court had he accepted either of the two offers of appointment to that august tribunal. His belief in law as law, his intention that the Department of State shall be conducted upon principles of law and in consonance with the law of the land, are evidenced not merely by his training and experience but by his selection as counselor of the Department, of the Honorable Henry M. Hoyt, formerly Solicitor-General of the United States. It is to be hoped that Mr. Knox and his assistant, Mr. Hoyt, will not confine themselves merely to the individual questions of policy in which the United States is interested, but that they may be able to make the judicial settlement of international controversies a confession of faith with the United States, the regular and ordinary method of adjusting difficulties which diplomacy has failed to settle, by the establishment of the Court of Arbitral Justice accepted in principle by the Second Hague Peace Conference and recommended to the nations for constitution through diplomatic channels.

THE CASABLANCA ARBITRATION

In the judicial decisions in the July number of the JOURNAL[1] the text of the Casablanca award was printed in full and both France and Germany were shown to be in the wrong in certain particulars pointed out in the decision of the tribunal. France and Germany accepted the sentence and the findings of the court; and the nations so lately in controversy have issued the following formal statement (May 29, 1909):

> Whereas the imperial German government and the government of the French Republic agreed on November 10, 1908, to lay before a court of arbitration assembled for the purpose all the questions arising out of the occurrences which took place at Casablanca on September 25, 1908, and whereas both governments undertook to express mutually their regret at the action of their officials in accordance with the decision on the question of fact and of law which should be reached by the arbitrators, and whereas the court of arbitration at The Hague on May 22, 1909, recognized and announced the following: [Here follow the findings of the Hague Court.]
>
> The imperial German government and the government of the French Republic declare therefore each in so far as it is concerned that they express their regret for the conduct for which their officials are blamed in the award of the court of arbitration.

This protocol, equally honorable to France and Germany, closes in a peculiarly happy and judicial way the incident, and it is to be hoped that the nations in future may follow the noble precedent of submitting their controversies, even although they involve questions of honor, to international arbitration; that each nation may accept the decision however inconsistent it may seem to be with their previous contentions and give immediate and full effect to the award without questioning its propriety or manifesting displeasure at its terms. Imitation in this instance is not only the sincerest flattery, but conducive to peace and the world's best interests.

THE FRANCO-GERMAN RAPPROCHEMENT

The address of Baron d'Estournelles de Constant delivered on April 28, 1909, in the Prussian Upper House was an event of uncommon significance, because the speaker is a member of the French Senate, the invitation to deliver the address came from the German committee to promote better relations between Germany and France, and the address itself was delivered in Berlin, the capital of the German Empire. The situation was trying, but d'Estournelles de Constant is as courageous as he is gentle, as prudent and tactful as he is hopeful of the future, and

[1] 3:755 (July, 1909).

his devotion to France is united with a sincere desire for the welfare of Germany and the world at large whereof he is an honored and influential citizen. It is scarcely too much to say that it required more simple and unalloyed courage to speak in Berlin than to enter Berlin at the head of an army, and the man of peace performed a greater and more genuine service to his country than the patriot on horseback.

The possibility of war between Germany and France is a source of uneasiness to the enlightened not only in Germany and France but in the world at large, for nations are so closely bound together that the misfortune of any one affects all members of the international community and the evil consequences of war are brought home to the most distant, although its unutterable miseries are heaped upon the victor and the vanquished. It is natural that France should grieve over lost provinces; it is equally natural that Germany should stand ready to maintain by the sword what the sword has won. Time blunts the edge of sorrow and enlightened statesmanship must deal with the present as it finds it and make good the losses of the past by the triumphs of the future; for the line of progress is towards the future, not towards the past, and a nation that lives in the past and broods over its losses is likely to be outstripped in the race, and sacrifice the future as well. The sun of France did not set at Sedan and it is a perverted and vicious standard that measures a nation's greatness, usefulness and influence by success or failure upon the battlefield. Luther and Melancthon, Goethe and Schiller, Kant and Beethoven, are greater figures in the world's history than Blücher and von Moltke; Corneille and Racine, Molière and Voltaire, Lavoisier and Laplace, have exerted a wider and more beneficent influence than Louis XIV and his captains, and withstood the shock of Waterloo which overthrew the Corsican and his camp-followers.

D'Estournelles de Constant performed an international service in discarding military success as the test of national greatness and in substituting in its stead usefulness, helpfulness, and international cooperation which are only possible in times of peace.

The address of d'Estournelles de Constant, abounding in telling and happy phrases, almost compels quotation, but its length forbids its insertion in full and makes it necessary to present the argument in summary form. The thesis is that patriotism taken broadly, the welfare of Germany and France and the future of civilization, depend upon the rapprochement of the two countries, and that the closer relations of Germany and France are not only necessary and possible, but unavoidable.

M. d'Estournelles de Constant felt the embarrassment of speaking as a Frenchman in Berlin and that his appearance might be misconstrued as a confession of weakness and as imprudent. It was not a confession of weakness because France has recovered from the war of 1870 and is physically able to protect its just rights against attack by the use of force should it unfortunately be necessary. In the second place, it was not imprudent, because although certain questions could not be considered, it was unnecessary to discuss them as he meant to deal with the future, even although he did not forget the past. Even in case of a successful war France would lose confidence and credit, the sources of its strength, and by a successful war Germany would arouse envy and jealousy and by its military preponderance suggesting conquest, it would appear as a menace to peace. War would therefore be unfortunate considered in itself, whichever country won. War between the two nations is therefore unthinkable. If war is so unreasonable as to be well nigh impossible, preparations for war are as unreasonable as they are useless and the "armed peace" between the two nations imposes a serious burden upon the commerce and industry of the two countries, estimated by M. d'Estournelles as equivalent to a tax of ten per cent for military expenditures, which renders it impossible for them to devote to social and economic reform, education, and internal improvements, the vast capital so necessary for these purposes.

M. d'Estournelles proceeds to analyze the contributions made by Germany and France to the world's civilization and the influence of each upon the other. He finds that the intellectual cooperation of the past has been so productive of good, that, however dissimilar in means, the end has been the same and that the points in common are so many, so various and so great that we can well afford to overlook the points of difference in order to reach a *modus vivendi*. Germany and France will continue to exist. Germany increases its population, France increases its energy, both possess the elements of fruitful cooperation. Even the very differences are a guarantee and by reason of them the two nations should approach each other; German patience and the German method, the French intuition and French industry, are, if united, destined to produce incalculable benefit to the world.

How is the rapprochement of Germany and France, indispensable for themselves and necessary for the peace and advancement of the world, to be brought about? M. d'Estournelles addressed himself seriously to this question and answers clearly and rightly by the desire for rapproche-

ment felt by the enlightened subjects and citizens of Germany and France, for a diplomatic agreement between the two countries would be worthless if not supported by the people. Again it might be embarrassing for either government as such to take the initiative but if desired by public opinion of both countries, the governments will undoubtedly follow where they might perhaps hesitate to lead. The first great essential is that the German and the French should consider a rapprochement as desirable, which to be honorable and permanent must be acceptable equally and honorable to both countries. Public opinion is the master not the servant, and a new element, international public opinion, the creation of the past few years, will reinforce national initiative.

It is to be hoped that d'Estournelles de Constant's address will be widely circulated and read, for it must be evident even to the general reader as well as to the close student of affairs that Germany has nothing to gain by war and much to lose; that to France a successful war might mean the man on horseback as in the past, and in case of defeat, annihilation. Both nations should and must continue to exist, blessing mankind by their contributions to science, philosophy, literature and art. The world is large enough for the legitimate ambition and the continued existence of both: misfortune to either would set back the hands of progress. The day is past when the cry *delenda est Carthago* can arouse anything but horror in the man of feeling as well as reason. The world was poorer by the destruction of Carthage. What it might have contributed to the world's civilization we shall never know, but we do know what France has contributed and what Germany is actually contributing. We also know that the world is better, richer and fuller for their independent existence, and the contributions of the past are as nothing to the contribution of the future. The French *esprit* is as essential as the German *Fleiss*, and the loss of one or the other or its impairment by war would be an international as well as a national loss.

THE ARBITRAL AWARD IN THE PERU–BOLIVIA BOUNDARY CONTROVERSY

For the past two months the governments of South America and the friends and partisans of arbitration throughout the world have been awaiting anxiously the acceptance by Bolivia and Peru of the arbitral award rendered on the ninth day of July, 1909, by the President of the Argentine Republic as arbitrator, in the boundary dispute submitted for his decision by the Republics of Bolivia and Peru. As the JOURNAL

goes to press it is learned that after much misgiving Bolivia, to whose claims the award was in certain respects adverse, has decided, on September 15, 1909, in accordance with the general treaty of arbitration of November 21, 1901, and the special agreement December 30, 1902, to accept the award as a final and conclusive settlement of the controversy, concluding, however, through diplomatic channels, a protocol signed September 17, 1909, by the terms of which certain concessions are made by Peru in order to meet the objections to the award strenuously and indeed passionately urged by Bolivia. In the acceptance of the award, however distasteful it may have been, or apparently humiliating to its national ambitions, Bolivia has confessed its faith in arbitration, and shown by example that public opinion is in itself sufficient to execute a judgment involving the good faith of a nation without a resort to force.

It is not the purpose of the present brief comment to enter into the geographical details of the question, which require a thorough knowledge of the topography of the territory in dispute, but to present in summary form the negotiations leading up to the arbitration.

It is well known that Latin-America has been for many years a professed, one might almost say, a violent partisan of international arbitration, as abundantly appears from Senor Quesada's "Arbitration in Latin America." It is also common knowledge that the first Pan-American Conference of 1889–90, held at Washington, drafted a very careful treaty of arbitration, which, although approved by the conference, failed of ratification by the contracting states; that the Second Pan-American Conference held in the City of Mexico, in 1901–02, adopted a treaty for the arbitration of pecuniary claims which has been ratified by a number of powers including the United States; and that in 1906 the Third Pan-American Conference held at Rio de Janeiro, reaffirmed and urged the ratification of the treaty of pecuniary claims drafted by the preceding conference at Mexico. In addition the American republics represented in the international conference at Mexico, solemnly declared that "though they were not signatory of the three conventions signed at The Hague on the 29th July, 1899, they acknowledge the principles contained in them as part of the Public International Law of America." From this statement it is evident that arbitration as defined and systematized in the convention for the peaceful settlement of international disputes was adopted singly and collectively by Latin America. Article 19 of the Hague convention provided that,

Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the signatory powers, these powers reserve to themselves the right of concluding, either before the ratification of the present act or later, new agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

Therefore to give effect to the provisions of this article Bolivia and Peru concluded a general treaty of arbitration, signed at La Paz, November 21, 1901,[1] by virtue of which they bound themselves to submit to arbitration all controversies present or future "whatever may be their nature and causes, provided that it has been found impossible to settle them by direct negotiation," (article 1); for the submission of the issue a special convention (*compromis*) was to be concluded (article 2); the arbiter was to be the permanent tribunal of arbitration established by virtue of the resolution of the Pan-American Conference at Mexico (article 4); and in the event that it should not be established the contracting parties agreed to designate as arbitrator the government of the Republic of Argentine, the government of Spain, or the government of Mexico (article 5). The decision was to be "in strict obedience to the provisions of international law, and, on questions relating to boundary, in strict obedience to the American principle of 'uti posseditis' of 1810, whenever * * * the application of the special rules shall not be established, or in case the arbitrator shall (not?) be authorized to decide as an *aimable compositeur*," (article 8). The sentence was to be final without appeal and its execution was entrusted to the honor of the signatories, unless the award was based upon "a counterfeit document, or * * * one that has been tampered with," or was the consequence of a mistake of fact (article 12), in which case the revision should take place before the arbitrator who had rendered the sentence upon an application made within six months of the delivery of the award (article 13).

Pursuant to this general treaty of arbitration of November 21, 1901, Bolivia and Peru concluded a special agreement (*compromis*) on December 30, 1902,[2] submitting to the government of the Republic of Argentine the boundary dispute in question, in order to have decided definitely and without appeal whether certain territory lying within the jurisdiction or district of the ancient Audience of Charcas, belonged of right to the republic of Bolivia or to the republic of Peru (article 1). The evidence to be considered and upon which the arbitrator should render his decision was defined in article 3, namely, "the laws of the

[1] See SUPPLEMENT, p. 378.

[2] *Ib.*, p. 383.

recompilation of the Indies, royal schedules and orders, the decrees of intendentes, the diplomatic documents relating to the demarcation of frontiers, official maps and descriptions, and in general * * * all the documents which may have been dictated with official character, so as to give the true and correct meaning and effect to the said royal dispositions." When, however, the "royal acts and dispositions do not define the dominion of a territory in clear terms, the arbitrator shall decide the question according to equity, keeping as near as possible to the meaning of those documents and to the spirit which inspired them" (article 4). And the award when pronounced was to become definitive and binding by the "mere fact of it being communicated to the aforesaid envoys extraordinary and ministers plenipotentiary of the high contracting parties," and "from that moment the territorial delimitation shall be considered definitely and compulsorily established by right between both republics" (article 9).[3]

From the foregoing it therefore appears that Bolivia and Peru entered into a general treaty of arbitration by virtue of which they bound themselves to submit to arbitration controversies which diplomacy had failed to settle and that by the special agreement of December 30, 1902, they specifically submitted to the government of the Argentine Republic a clearly defined boundary dispute, binding themselves both in the general arbitration treaty of November 21, 1901, and the special agreement of December 30, 1902, to accept the award of the arbitrator as a final and conclusive disposition of the controversy. The submission to arbitration so necessarily implies compliance with the award that the obligation would be presumed were it not expressly stated. Bolivia and Peru in accepting the Hague Conventions as part of the public law of America, necessarily adopted article 18 of the First Hague Conference which provides that "the arbitration convention implies the engagement to submit loyally to the award," and they bound themselves specifically to accept the award as final without appeal both in the general treaty of arbitration and in the special agreement. As members of the Second Hague Peace Conference, they both voted for and approved the convention for the pacific settlement of international disputes of October 18, 1907, article 37 of which states that "recourse to arbitration implies an engagement to

[3] By subsequent agreement of Bolivia and Peru, the special agreement of December 30, 1902, was modified in a particular immaterial to our present purpose. *See* Foreign Relations of the United States, 1904, p. 686; and SUPPLEMENT, p. 386.

submit in good faith to the award." It therefore appears that Bolivia and Peru not only specifically by solemn conventions between themselves were obligated to accept in good faith and execute the award, but that they bound themselves in the Second Pan-American Conference to accept and execute the award, and by their presence, their votes, in the Second Hague Conference and the ratification of the convention for the pacific settlement of international disputes they bound themselves to the nations of the world, accepting and applying the principles of international law, to give full effect to an arbitral sentence. The failure to do so would have been not merely the breach of a conventional stipulation between the two countries but of an international obligation of the greatest solemnity and importance. Their international standing would have been questioned, their credit would have been shaken, and the cause of arbitration would have been wounded in the house of its friends, for there is fortunately no precedent for the non-execution of an arbitral award.

RENEWAL OF MODUS VIVENDI CONCERNING NEWFOUNDLAND FISHERIES

It is a matter of sincere congratulation that the governments of Great Britain and the United States have decided to continue in force the present *modus vivendi* of 1908, pending the arbitration of the North Atlantic Coast Fisheries question, the text of which, as well as of its immediate predecessor, is to be found in the SUPPLEMENT[1] to the JOURNAL.

When the *modus vivendi* of 1908 was negotiated it was expected by both governments that an agreement to arbitrate, and the issues to be submitted to arbitration would be prepared and accepted at an early date, but the actual negotiation of the agreement and the formulation of the issues to be submitted required much time and consideration, and the policy of the British government in consulting the dependencies involved, namely, Canada and Newfoundland, occupied more than double the time expected. The agreement to arbitrate and the question to be submitted were signed January 27, 1909, submitted to the Senate and duly consented to by that body on February 18, 1909, and by an exchange of notes dated March 4, 1909, the preliminary agreement to arbitrate and the questions to be arbitrated went into effect.[2] Under date of

[1] *1*:349, *2*:327.

[2] For the text of this important document and for its analysis, see this JOURNAL, *3*:461; and SUPPLEMENT, *3*:168.

September 9, 1909, the Department of State learned that Great Britain consented to the renewal of the *modus vivendi* until the close of the arbitration proceedings to be held at The Hague.

That the question, however difficult or complicated it may be, is nevertheless susceptible of diplomatic regulation, is evidenced by the fact that since the *modus vivendi* of 1906 there has been no fishing controversy of any importance between the two governments, and British subjects and American citizens have pursued their calling within the treaty limits without vexation or any appreciable annoyance. It is to be hoped that the arbitral award interpreting the convention of 1818 will be so clear and explicit in its terms as to prevent doubt or ambiguity as to its meaning, and to settle fully the rights of Great Britain and the United States under the convention.

BRITISH EXTRATERRITORIAL JURISDICTION IN SIAM

The equality of states is said to be a fundamental conception of international law, and within certain limits the statement may be accepted. It should be borne in mind, however, that equality of right is not synonymous with influence, and while technically speaking a small nation such as Haiti may be treated as an equal by Great Britain, and accorded the rights before the law claimed and exercised by Great Britain, the influence of the former can not be compared to the influence of the latter. Equal before the law, they are unequal in influence. It should also be noted, however, that the partisans of the theory of the equality of nations, while applying it to the states whereof they are citizens or subjects, limit in practice its application to states in regular and full standing in the family of nations. Oriental nations, however old their civilization, are not by the mere fact of statehood regarded as equals or treated as such and are only admitted to full membership in the family of nations upon satisfactory evidence that the citizens or subjects of foreign states enjoy within their dominions the rights, privileges, and protection of law accorded in European and American communities. Where these guarantees are lacking foreign states claim the right to protect their citizens according to their own forms and process of law, and treat them as if they resided within territory actually subject to their jurisdiction.

Extraterritorial jurisdiction is thus claimed and exercised, and the status created by the exercise of this jurisdiction is termed "extraterri-

toriality." Originating in the Orient, custom has given to it the force of law and the rights possessed by foreign nations, over their citizens and subjects in foreign parts — in Turkey, for example — are based rather upon the unwritten law, that is to say, usage and custom, than upon provisions of treaties or the disposition of a code. In countries more recently opened to the inroads of European and American civilization the rights over their citizens residing in such parts are measured by treaties concluded within the past century, and it may be said that extraterritorial jurisdiction outside of Turkey is based upon the express provisions of treaties granting to the European and American nations the rights considered necessary for the protection of their subjects or citizens domiciled in the countries rightly or wrongly considered as their inferiors. It can not be doubted, however, that extraterritorial jurisdiction is inconsistent at once with the broadest or most restricted definition of equality, and it is historically too clear for argument that the exercise of extraterritorial jurisdiction will disappear as soon as the states in which it exists shall conform to the European and American standard of justice and offer the guarantees necessary for the assumption and exercise of sovereignty over all within their borders. Extraterritoriality which formerly existed in Japan has ceased, and in fact as well as in theory Japan is an equal among the nations and sovereign at home as well as abroad. Extraterritoriality is a passing phase of international development, and will, it is to be hoped, be a stranger in the domain of international law.

The treaty of March 10, 1909,[1] between Great Britain and Siam, is a formal announcement of the fact that Great Britain is ready upon the reorganization of the Siamese courts and practice, and the promulgation of their codes of law, now in process of compilation, to renounce the extraterritorial rights hitherto exercised by Great Britain in Siam. Leaving out of consideration the treaty of 1826,[2] modified in many respects by the treaty of April 18, 1855,[3] the right to exercise jurisdiction over British subjects was conceded by Siam in the following terms:

> The interests of all British subjects coming to Siam shall be placed under the regulation and control of a consul, who will be appointed to reside at Bangkok; he will himself conform to, and will enforce the observance by British subjects

[1] See SUPPLEMENT, p. 297.

[2] For text, see Hertslet's Commercial and Slave Trade Treaties, Laws, etc., *8*:707.

[3] *Idem*, *10*:565.

of all the provisions of this treaty, and such of the former treaty negotiated by Captain Burney in 1826, as shall still remain in operation. He shall also give effect to all rules or regulations that are now, or may hereafter be, enacted for the government of British subjects in Siam, the conduct of their trade, and for the prevention of violations of the laws of Siam. Any disputes arising between British and Siamese subjects shall be heard and determined by the consul, in conjunction with the proper Siamese officers; and criminal offences will be punished, in the case of English offenders by the consul, according to English laws, and in the case of Siamese offenders, by their own laws, through the Siamese authorities. But the consul shall not interfere in any matters referring solely to Siamese, neither will the Siamese authorities interfere in questions which only concern the subjects of Her Britannic Majesty.[4]

The treaty of 1855 was itself modified by the commercial agreement of May 13, 1856,[5] the material portion of which is as follows:

With reference to the punishment of offences, or the settlement of disputes, it is agreed:

That all criminal cases in which both parties are British subjects, or in which the defendant is a British subject, shall be tried and determined by the British consul alone. All criminal cases in which both parties are Siamese, or in which the defendant is a Siamese, shall be tried and determined by the Siamese authorities alone.

That all civil cases in which both parties are British subjects, or in which the defendant is a British subject, shall be heard and determined by the British consul alone. All civil cases in which both parties are Siamese, or in which the defendant is a Siamese, shall be heard and determined by the Siamese authorities alone.

That whenever a British subject has to complain against a Siamese, he must make his complaint through the British consul, who will lay it before the proper Siamese authorities.

That in all cases in which Siamese or British subjects are interested, the Siamese authorities in the one case, and the British consul in the other, shall be at liberty to attend at, and listen to, the investigation of the case; and copies of the proceedings will be furnished from time to time, or whenever desired, to the consul or the Siamese authorities, until the case is concluded.

The British government therefore was given extensive jurisdiction over British subjects residing within Siam and by an Order in Council, dated July 28, 1856, to give effect to the provisions of the treaty it was ordered

That it shall be lawful for Her Majesty's consul to hear and determine any suit of a civil nature against a British subject, arising within any part of the dominions of the Kings of Siam, whether such suit be instituted by a subject

[4] *Idem*, *10*:558.
[5] *Idem*, *10*:565.

of the Kings of Siam, or by a subject or citizen of a *Foreign* State in amity with Her Majesty.[6]

The subject of extraterritorial jurisdiction was again and more elaborately considered in the treaty concluded between Great Britain and Siam, dated September 3, 1883, from which article 8 is quoted in full as necessary to the understanding of the treaty of March 10, 1909:

His majesty the King of Siam will appoint a proper person or proper persons to be a commissioner and judge or commissioners and judges, in Chiengmai for the purposes hereinafter mentioned. Such judge or judges shall, subject to the limitations and provisions contained in the present treaty, exercise civil and criminal jurisdiction in all cases arising in Chiengmai, Lakon, and Lampoonchi, between British subjects, or in which British subjects may be parties as complainants, accused, plaintiffs, or defendants, according to Siamese law; provided always, that in all such cases the consul or vice-consul shall be entitled to be present at the trial, and to be furnished with copies of the proceedings, which, when the defendant or accused is a British subject, shall be supplied free of charge, and to make any suggestions to the judge or judges which he may think proper in the interests of justice: provided also, that the consul or vice-consul shall have power at any time, before judgment, if he shall think proper in the interests of justice, by a written requisition under his hand, directed to the judge or judges, to signify his desire that any case in which both parties are British subjects, or in which the accused or defendant is a British subject, be transferred for adjudication to the British consular court at Chiengmai, and the case shall thereupon be transferred to such last-mentioned court accordingly, and be disposed of by the consul or vice-consul, as provided by article II of the Supplementary Agreement of the 13th May, 1856.

The consul or vice-consul shall have access, at all reasonable times, to any British subject who may be imprisoned under a sentence or order of the said judge or judges, and, if he shall think fit, may require that the prisoner be removed to the consular prison, there to undergo the residue of his term of imprisonment.

The tariff of court fees shall be published, and shall be equally binding on all parties concerned, whether British of Siamese.[7]

It is seen therefore that extraterritorial jurisdiction with the questionable exception of Turkey, is a conventional right, granted and limited by express provisions of the treaty, although to give full effect to the grant it is customary for the grantee to provide either by executive action (orders in council) or by a statute of congress as in our own country, the rules and regulations for the observance of the consul or official in the exercise of extraterritorial rights and privileges.

[6] *Idem*, *10*:579.

[7] British and Foreign State Papers, 74:80.

So far as the United States is concerned, extraterritoriality is claimed and exercised in Siam. In the treaty of March 20, 1833, it was provided in article 9 that "merchants of the United States trading in the kingdom of Siam shall respect and follow the laws and customs of the country in all points."[8] But as our interests in Siam became more considerable, the attention of our government was called to the advisability of placing the protection of American citizens in the hands of responsible American officials. Therefore in the second article of the treaty of May 29, 1856, extraterritorialty was claimed, admitted, and is exercised at the present time in the following terms:

> The interests of all American citizens, coming to Siam, shall be placed under the regulations and control of a consul, who will be appointed to reside at Bangkok. He will himself conform to and will enforce the observance by American citizens, of all the provisions of this treaty, and such of the former treaty, negotiated by Mr. Edmund Roberts in 1833, as shall remain in operation. He shall also give effect to all rules and regulations as are now or may hereafter be enacted for the government of American citizens in Siam, the conduct of their trade, and for the prevention of violations of the laws of Siam. Any dispute arising between American citizens and Siamese subjects shall be heard and determined by the consul in conjunction with the proper Siamese officers; and criminal offences will be punished in the case of American offenders, by the consul, according to American laws, and in the case of Siamese offenders, by their own laws, through the Siamese authorities. But the consul shall not interefer in any matters, referring solely to Siamese, neither will the Siamese authorities interfere in questions, which only concern the citizens of the United States.[9]

It is to be hoped that the situation created by the reforms now in progress and the experience of Great Britain under the treaty of March 10, 1909, and of France under a similar treaty, dated March 23, 1907, will be so satisfactory and persuasive that the day is not far distant when foreign nations with interests in Siam may feel justified to entrust their protection and administration to the duly constituted Siamese authorities.

LIBERIA

The recent visit to Liberia in American warships of a commission appointed by the United States government has brought within the public eye the little negro republic on the west coast of Africa. Although an almost negligible international factor by reason of its geographical posi-

[8] Treaties in Force, 1904, 705.
[9] Treaties in Force, 1904, 707.

tion, its scanty governing population, the absence of national wealth, and, the inevitable consequence of the two latter — national weakness, the very mention of the name Liberia can not fail to arouse the keen interest of the student of the history of the last century, for it at once recalls to mind the days of slavery in the United States and the awful African slave-trade with its horrors, atrocities and human sacrifices.

It is not at present possible to discuss what the intentions of the American government with respect to Liberia may be, inasmuch as the Commission's report has not as yet been made public. It is hoped that this may be the subject of an article in a future number of the JOURNAL. It may be of interest, however, to call attention to the ties, moral at least, which connect the African with the American republic and therein account for the signal interest manifested by the latter in the former by the sending of the Commission.

The simple classification of the country as a civilized negro republic is in itself sufficient to indicate that it is an off-shoot of the American republic within whose borders there are more people of the African race than anywhere else in the world with the exception of Africa itself. A brief résumé, however, of the history of the planting of these negroes imbued with American ideas of government upon west African equatorial shores may not be out of place.

Recurring to social conditions in the United States after its independence and prior to the Civil War, it is seen that in many instances negro slaves, whether through the humanity of their masters or purchase as the result of their own industry and thrift or otherwise, were emancipated; but it was soon found that, under the then existing social conditions, the states in which the slaves had been freed was no place for "free persons of color" as they were called. The white master, the negro slave, were the two well-defined classes; a free negro was surely out of place.

Early in the nineteenth century an agitation for the deportation of freed slaves to some place outside the limits of the United States was commenced, and in some instances it took the form of state recommendations to the federal government. The movement, accelerated by the desire of philanthropists to Christianize and promote civilization in the Dark Continent, crystalized in 1816 in the formation, by eminent persons from the several states of the Union, of the American Colonization Society. After several attempts the society succeeded, in 1822, in founding a settlement on the west coast of Africa which they called Monrovia,

in honor of James Monroe, then president of the United States. A few years later other colonization societies were formed in several of the states of the Union which founded other settlements near Monrovia and the various settlements subsequently uniting were formed into the Commonwealth of Liberia. It was through these various colonization societies that the freed negroes of America were given a place of refuge in the land of their fathers.

The numbers of the colonists were considerably augmented through the enactment and enforcement by the United States of the statutes for the suppression of the slave trade. In the execution of these statutes the disposition of the negro slaves found aboard a captured slave-trading vessel was a difficult question, but its solution was found in sending the unfortunate Africans to the settlements in Africa founded by the American societies, where they could be cared for under the regulations of those societies and given a new start in life on their own native soil.

For a quarter of a century the Liberian settlements and their successor, the Commonwealth of Liberia, occupied an anomalous position in the international world. They were not regarded by the United States government as American colonies, nor did the United States claim to exercise any control over or assume any respensibility for the acts of the colonists. They did not constitute an independent people for their governor was appointed by the Colonization Society, an organization of private American citizens. They were nothing more or less than a private individual enterprise occupying a large territory purchased from the native owners of the soil over which no sovereign government claimed or exercised jurisdiction.

It was but natural, however, that the settlements could not remain indefinitely in this anomalous position. With the development of the colonies the necessity arose for the making of regulations governing trade by foreigners within Liberian territory, for the collection of customs revenues, etc. Needless to say, the foreign traders who heretofore had carried on their business free and untrammelled vigorously objected to and attempted to disregard and evade the Liberian regulations, and when Liberia sought to make her regulations effective by the use of force the governments of the traders concerned denied the right of Liberia to exercise powers and rights appertaining to a sovereign government.

In this state of affairs it became imperative that, if Liberia were to continue along the lines of progress, she should assume a definite international status. Efforts to have the United States assume a protectorate

over her failed, and as a final means of enabling the Commonwealth to exercise acts of sovereignty, the settlers upon the advice of the Colonization Society, at a convention held in Monrovia in July 1847, declared themselves an independent nation and adopted a Constitution modeled after that of the United States. Liberian independence was quickly recognized by several of the European powers, but it was not until 1862 that recognition was obtained from the United States, there being objection in America up to that time to receiving negro diplomatic representatives.

From the time of the first settlement of American negroes on the west African coast to the present day the United States has in many ways manifested its deep interest in the welfare of those people. United States ships of war acted as convoys to some of the first expeditions to Africa and United States naval officers assisted the first colonists in the negotiation of treaties of cession with the natives. For a long time during the early days of the country Liberian prestige was considerably enhanced, especially with the natives, by the presence of an American squadron which was kept on the west coast of Africa to assist in the suppression of the slave trade. Article VIII of the treaty of 1862 between the United States and Liberia allows of the protection of the Liberians by the United States against the aboriginal inhabitants upon the solicitation of the government of Liberia. On many occasions since the independence of the country the United States has interposed its friendly good offices in behalf of Liberia in its boundary disputes with neighboring nations and has repeatedly expressed its special and peculiar interest in the little republic.

In view, therefore, of what may well be called the maternal attitude which the United States has assumed toward Liberia, it is not at all surprising that when, a little over a year ago, a crisis was reached in her affairs by reason of serious complications with her powerful neighbors, Liberia should have urgently appealed to the United States, through a special mission sent to Washington for that purpose, for help out of her difficulty. The nature of the assistance asked for, the general attitude of the United States toward rendering assistance to Liberia, together with some idea of the conditions existing in the country, are set forth in the following letter of the Secretary of State to the President of the United States, dated January 18, 1909:

In the month of June last the Republic of Liberia, through a commission specially accredited to this government, applied to the United States for assist-

ance in maintaining its independence and to enable it to carry on a peaceful and orderly government. The particular form of assistance which the commissioners contemplated in their application was chiefly a guaranty by the United States of the territorial and political integrity of Liberia, with such reservations and upon such conditions as might be agreed upon.

Upon being convinced that such a guaranty was impracticable, the commissioners further requested that the United States should lend to Liberia officers to aid in the conduct of its administration and should confer with the governments of other countries having interests on the west coast of Africa, and particularly with Great Britain, which has rendered material assistance to Liberia in the past, with a view to give to Liberia the moral support which would result from evidence of interest in her welfare on the part of the United States.

To these requests attentive consideration has been given. There have been full conferences with the commissioners and with Mr. Booker T. Washington, who was much interested in their mission, and with representatives of other interested powers, and reports from general and from special representatives, of the United States in Liberia, and the conclusion reached by the State Department is quite clear that Liberia is very much in need of assistance, that the United States can help her substantially, and that it is our duty to help her.

The condition of Liberia is really serious. Between forty and fifty thousand civilized negroes, for the most part descendants of the original colonists from the United States, occupy a territory comprising 43,000 square miles, in which there are also over a million and a half members of uncivilized native tribes. The civilized part of the population have been to a great degree cut off from any intimate relation with the rest of the civilized world for two-thirds of a century. They began with but little education, with no acquired skill in the art of government, and they have had but little opportunity to improve through intercourse with other and more advanced communities. They find it especially difficult to control the native tribes or to conduct their own government in accordance with modern requirements.

The British colony of Sierra Leone to the north and the French possessions closing in their hinterland to the east are almost continuously complaining of the failure of Liberia to maintain order upon the border. Notwithstanding the very kindly disposition on the part of Great Britain and the similar disposition on the part of France, there is imminent danger that the republic, unless it receives outside assistance, will not be able to maintain itself very long.

It is unnecessary to argue that the duty of the United States toward the unfortunate victims of the slave trade was not completely performed by landing them upon the coast of Africa, and that our nation rests under the highest obligation to assist them, so far as they need assistance, toward the maintenance of free, orderly, and prosperous civil society.

The interest of the people of the United States in the welfare and progress of the millions of American citizens of the black race in the United States also furnishes a strong reason for helping to maintain this colony, whose success in self-government will give hope and courage, and whose failure would bring discouragement to the entire race.

With all the study which it has been possible to give and with all the assist-

ance which the Liberian commissioners themselves could give, it has been found very difficult to determine the precise things which the government of the United States had better do by way of giving assistance, and upon the most careful consideration I am satisfied that we ought to send to Liberia a commission of three experienced and judicious Americans to examine the situation there and confer with the officers of the Liberian government and with the representatives of other governments actually present in Monrovia, with a view to reporting recommendations as to the specific action on the part of the government of the United States which will constitute the most effective measures of relief.

In presenting this recommendation to Congress, President Roosevelt stated that "the relations of the United States to Liberia are such as to make it an imperative duty for us to do all in our power to help the little republic which is struggling under such adverse conditions."

Congress heeded the recommendation of the President and an appropriation of twenty thousand dollars was made to put it into effect. The Commission appointed by Secretary of State Knox consisted of Hon. R. P. Falkner, Chairman; Dr. George Sale and Mr. Emmett J. Scott, Commissioners; Mr. George A. Finch, Secretary; Major Percy M. Ashburn and Captain Sydney A. Cloman, U. S. Army, Military Attachés; and Mr. Frank A. Flower, Civilian Attaché. The Commission sailed for Monrovia on April 24th last, on the scout cruisers *Chester* and *Birmingham*, spent a month in Liberia and Sierra Leone, and have returned to the United States. Their report and recommendations, now in the course of preparation, are awaited with deep interest, for it is realized that upon the results of the Commission's labors may depend the fate of a nation, and that nation is one of the two which are endeavoring to demonstrate to the world the ability of the negro, without aid or interference from the white man, to carry on a modern civilized government. Truly it may be said that the fate of Liberia means more than the fate of a nation, it may presage the destiny of a race.

THE FOURTH PAN-AMERICAN CONFERENCE

Pan-America is to meet in conference at Buenos Aires in August 1910, and a tentative programme for its deliberation has been prepared by a specially appointed committee of the Governing Board of the Bureau of American Republics at Washington, whose duty it is by a resolution of the Third Conference held at Rio de Janeiro in 1906, to prepare a programme for the Fourth Conference to be held in 1910.

The proposed programme is as follows:

I. Conventions and Resolutions of the Third Pan-American Conference held at Rio de Janeiro in 1906.

Report to be submitted by each delegation on the action of the respective governments on these conventions and resolutions.

II. Pan-American Committees.

Reports to be submitted on the results accomplished by the committees appointed under the Rio resolution and consideration of extension of their functions.

III. The International Bureau of the American Republics.

(*a*) Consideration of the report of the Director.

(*b*) Organization of the Bureau of the American Republics.

(*c*) Suitable action on the generous gift of Mr. Andrew Carnegie, which has made possible the construction of a new building.

(*d*) Resolution requesting each country to place in the building a statue or portrait of a national hero or historical personage.

(*e*) Franking privilege for the correspondence and publications of the Bureau.

(*f*) Resolutions recommending to the governments represented in the International Union to provide the Columbus Memorial Library, with duplicate copies of all statutes, decrees, and other official publications.

(*g*) Exchange of official publications.

IV. Codes of Public and Private International Law.

Consideration of any report or action of the International Commission of Jurists.

V. Pan-American Railway.

Report on progress that has been made since the Rio Conference, and consideration of the possibility of joint action to secure the completion of the system.

VI. Postal Rates and Parcels Post.

Convention providing for the reduction of postal rates and the establishment of parcels post.

VII. Uniformity in Census and Commercial Statistics.

Conventions providing for —

(*a*) Agreement as to the date upon which the census is to be taken in the several republics represented in the International Union.

(*b*) Uniformity of the schedules in the taking of the census and other statistics.

(*c*) Uniformity of classification in the compilation of commercial statistics.

VIII. Uniformity in Customs Regulations and Consular Documents.

Conventions providing for the simplification and co-ordination of customs regulations, and the establishment of greater uniformity in consular documents.

IX. Establishment of More Rapid Steamship Communication Between the Republics Represented in the International Union.

(*a*) Consideration of the conditions under which more rapid steamship communication can be secured.

(*b*) Appointment of a permanent Pan-American commission on navigation.

X. Supervision of the Food Supply.

(*a*) Uniformity of regulations for the inspection, immediately prior to shipment, of live stock intended for export.

(*b*) Uniformity of sanitary regulations in the preparation of refrigerated meats, canned goods, and other foodstuffs.

XI. Sanitary Police and Quarantine.

Consideration of the recommendation of the International Sanitary Congress of Mexico, held in December, 1907, and of the Congress of San José, Costo Rica, to be held in December, 1909, and of such additional recommendations as will tend to the elimination of preventable diseases.

XII. Monetary Systems and Fluctuations in Exchange.

Consideration of measures looking to the —

(*a*) Establishment of greater stability in commercial relations.

(*b*) Establishment of a more uniform monetary standard.

XIII. Conservation of Natural Resources.

Convention providing for the appointment of an international commission to consider the possibility of united action for the conservation of natural resources.

XIV. Wireless Telegraphy and Aerial Navigation.

Preliminary consideration of possible international regulations which may be required to govern these new modes of communication and travel.

XV. Pan-American Scientific Congress.

Consideration of the resolution of the Pan-American Scientific Congress and of the possibility of securing closer co-operation between the Scientific Congress and the Pan-American Conferences.

XVI. Patents, Trade-Marks, and Copyright.

Further consideration of any action that may be taken.

XVII. Foreign Immigration.

XVIII. Practice of the Learned Professions.

XIX. Naturalization.

XX. Neutrality in Case of Civil War.

XXI. Uniformity of Regulations for Protection Against Anarchists.

XXII. Future Conferences.

The final programme will be based upon the above, although tentative draft and it is safe to assume that however much it be amplified and modified in detail, it will not differ radically from the tentative draft which will be submitted to each of the twenty-one American Republics for amendment and approval before being adopted by the Bureau of the American Republics as the permanent programme of the conference.

A consideration of the draft indicates the vast scope of the conference and its power of good by an exchange of views upon discussions of the various topics included in the programme, for experience shows that however divergent the views of the participating countries it is nevertheless possible by good will and conciliation to reconcile differences at first sight irreconcilable, and to reach substantial agreement upon all questions of importance without ill will and controversies that outlast the conference.

Reserving for future discussion the provisions of the programme as finally adopted, it is sufficient to note that the future conference will be the fourth of the series of Pan-American Conferences called into being by the genius and foresight of Secretary Blaine, who proposed in a much celebrated note of November 29, 1881, the calling of the first conference to be held at Washington in 1882.[1] Postponed until 1888, the First Conference met in Washington, the second in the City of Mexico, in 1901–2; the third in Rio de Janeiro, made doubly memorable by the importance of its resolutions and the presence of Mr. Root, then Secretary of State.

The underlying purpose of the Pan-American Conference was aptly described by Baron Rio do Rio Branco, Brazilian Minister of Foreign Affairs in opening the Third Conference at Rio de Janeiro, in 1906:

> Our hopes are that from this Third Conference may result, confirmed and defined by practical acts and measures of common interest, the auspicious assurance that the times of true international fraternity are not far distant. It is already a pledge therefore the general trend of thought trying to conciliate opposed or apparently contrary interests and then to place them at the service of the ideal of peaceful progress. This assurance manifests itself already in the intelligence wherewith it is endeavored to promote more intimate political relations, to avoid conflicts, and to regulate the amicable solution of international divergencies, harmonizing the laws of commerce between nations, facilitating, simplifying, and strengthening their mutual relations.

[1] Foreign Relations of the United States, (1881), pp. 13–15.

In former times the so-called peace congress assembled to establish the consequences of wars, and the victors dictated their will to the vanquished in the name of future friendship, based on the respect due to the strongest power. The congresses of to-day are almost always convoked in times of peace, without any constraint, with clear foresight, in order to regulate the pacific activity of nations, and therein the right of the weak is considered as fully as that of the strong. They give body, form, and authority to international law, happily more and more respected in our days, which constitutes a great advance in the history of civilization. They have for origin the consensus of opinion produced by the greater diffusion of intellectual culture, by the progressive importance of economical interests, and by the assiduous propaganda of sentiments of humanity and of concord. Instead of the vexations and cruel negotiations, in which one party asks for justice or generosity and the other imposes the law of his sole will, we have now serene and amicable discussions in which each party sets forth simply and clearly his way of looking at practical questions and questions of general convenience. Here the concessions represent conquests of reason, amicable compromises or compensations, counseled by reciprocal interests. In them there are only friendly expressions, significative of true courtesy used by equals. And thus, far from diminishing, national dignity is increased at these diplomatic encounters, in which there are neither vanquishers nor vanquished.

These considerations are certainly familiar to the minds of the illustrious members of the international conference; they are familiar to and tacitly understood by all of us that are gathered here; but they may not be dispensed with as an express declaration of the real and sincere purpose with which we have come together.

The idea that the grouping of men is only made against other men is still a disagreeable survival of the past, when pessimism constituted the only lesson taught by history. The meeting of this Conference may, perhaps, give rise to the suspicion that we are forming an international league against interests not represented here. It is therefore necessary to affirm that, formally or implicitly, all interests will be respected by us; that in the discussion of political and commercial subjects submitted for consideration to the Conference it is not our intention to work against anybody, and that our sole aim is to bring about a closer union among American nations, to provide for their well-being and rapid progress; and the accomplishment of these objects can only be of advantage to Europe and to the rest of the world.

As young nations still, we should not forget what we owe to those who have furnished the capital with which we entered into the world of competition. The very immensity of our territories, in a great part unpopulated and unexplored, and the certainty that we have ample resources for a population ten or twenty times larger on this continent, would suggest to us the advisability of strengthening more and more our friendly relations, and of trying to develop the commercial interests which we have in common with an inexhaustible world of men, and prodigious fount of fertile energies like Europe. From Europe we come; Europe has been our teacher, from her we receive continually support and example, the light of science and art, the commodities of her industry, and the most profitable lessons of progress. What, in exchange for this moral and

material gift, we can give to her, by our growth and prosperity, will certainly constitute a more important field for the employment of her commercial and industrial activity.

Another statement of the aims and purposes of the conference and the means by which its results are and must be reached if they are to be acceptable and permanent is contained in the following apt paragraphs taken from the address of Mr. Nabuco, the present accomplished Brazilian ambassador to the United States, on assuming the presidency of the Third Conference:

Our purpose and our ambition are to carry out this policy in its highest sense — that is, to seek to make all of you our friends and friends among yourselves.

The aim of the American conferences was intended to be the creation of an American opinion, of an American public spirit, and it is very difficult to know how they should work to attain this end.

There are two ways of conceiving the work which these conferences can carry out.

One way is to consider them as great parliaments, open to public opinion, accounting orators according to the echo that the propagandist speeches pronounced by them may arouse in the spirit of the country where they have met and in that of their own countries.

The other way of judging them, and that is my way, is to believe that these conferences shall never aim at forcing the opinion of a single one of the nations taking part in them; that in no case shall they intervene collectively in the affairs or interests that the various nations may wish to reserve for their own exclusive deliberation. To us it seems that the great object of these conferences should be to express collectively what is already understood to be unanimous, to unite, in the interval between one and another what may have already completely ripened in the opinion of the continent, and to impart to it the power resulting from an accord amongst all American nations.

This method may appear slow, but I believe it to be the only efficacious one, the only way of not killing at its inception an institution which is worthy of enduring throughout the centuries.

It is not a small undertaking, neither is it a slight effort, to unify the civilization of the whole American continent. This will constitute one day their glory, but it is a work which requires much prudence; on the part of and amongst the nations, which shall successively have the honor of extending their hospitality to the conferences, there should exist only the desire to avoid anything that might draw us apart, to promote everything that may tend to bring us together.

It was through the force of American destiny, which remodels and recasts all the forms of action at its command, it was by an effort of will and tenacity that the difficulties encountered at the First and Second Conferences were powerless to shake the resolution of the various states of this continent to continue to meet as before. For my part, I feel certain that there is no nation that will fail to

profit by this point of view, which seems to me to be the only one capable of safeguarding the future of our reunions.

Besides the direct and immediate effect which is aimed at, there is the much more general and indirect effect which results from our coming together, from our mutual acquaintance, from the spirit of concord and of union which our collaboration can not fail to produce, from the desire to show to observers that we have no purpose whatever which might be looked upon with suspicion or distrust by the rest of the world.

In simplest form the Pan-American Conference, is the proclamation of American unity without in any way menacing Europe or its interests, and the formulation of conventions and resolutions calculated to give visible form and effect to the unity of aim and purpose, ambition and destiny of Pan-America.

THE PERSIAN REVOLUTION AND THE ANGLO-RUSSIAN ENTENTE

In the editorial columns of this JOURNAL for January of this year,[1] the Persian situation and Anglo-Russian relations arising therefrom were traced up to the closing weeks of 1908. There was little change until April of the present year. The constitution which had been granted in 1906 and overthrown in 1908 remained suspended in spite of many united protests of England and Russia in their sincere efforts to cooperate under the Anglo-Russian agreement of 1907. The revolt of the Azerbaijan Province with its center at Tabriz held out through the winter in spite of the siege maintained by royalist troops, which entirely cut off supplies.

As declared in the King's speech at the opening of Parliament in February, and brought out in the debate on the address of thanks, England and Russia had been endeavoring to avoid the necessity of forcibly intervening; but they found it difficult. Especially was this true with regard to Russia, since the disturbances were especially severe in the north, the Russian sphere. Finally Sir Edward Grey and Isvolsky, foreign ministers of their respective governments, after mature consideration and the fullest exchange of opinions had agreed on the steps which their governments thought indispensable. A force of British bluejackets was landed at Bushire on the Persian gulf; and the Russian consular force was strengthened at Resht, the principal point on the Caspian Sea.

[1] 3:170.

On April 20 the English and Russian legations at Teheran presented to the Shah a joint representation demanding a six days' armistice at Tabriz. This was necessary in order to prevent the horrible alternative of seeing the entire population of the city perish from hunger, if the revolutionaries held out, or be exterminated by the ruthless army of bandits, in case they surrendered. The two governments could not afford to see either occur when it was in their power to prevent it, since they had in the eyes of the world assumed responsibility for Persian affairs. The Nationalists of Tabriz had been told in advance that in return for the armistice they must be prepared to accept whatever terms the two powers should recommend to the Shah. They agreed, since their case was hopeless without the intervention. The Shah accepted, and terms were arranged.

But difficulties arose over their execution, especially with reference to the transport of food to the starving population. This provoked further intervention. On April 23 the Russian government notified the powers that in view of the situation at Tabriz,

> The Russian Chargé d' Affaires at Teheran was therefore instructed to declare to the Shah that if the Persian government did not immediately take steps to insure a supply of provisions for the Consulates and the foreign subjects in Tabriz, as well as for the noncombatant towns-folk, the Russian government would send troops to Tabriz in order to protect the Consulates and foreigners and secure a supply of provisions for them and the population.

The measure demanded not having been carried out, the troops and supplies were sent, reaching Tabriz April 29th.

It was more than two weeks after the imposition of the armistice before the negotiations were concluded. On May 9 two proclamations were published, one declaring the constitution reinstated and the other granting political amnesty. Royalist commanders were instructed to disband their troops. The revolutionaries ceased their resistance. The Russian forces remained, however, to make sure that the agreement did not miscarry.

The Shah professed to give a free rein to the ministry which had been created in consultation with the revolutionary leaders and under the supervision of the representatives of the two powers. The next matter to absorb attention was the arrangement of a new electoral law. This was completed early in June, but had still to be approved by the Anjumans, or local assemblies, of the provinces. During the same weeks negotiations were in progress with Russia for a loan of £100,000 on the

security of the customs, the expenditure of which was to be supervised by the Russian chargé d' affaires and the English minister. Before either the matter of the Russian loan or of the new electoral law had been completed a new crisis had occurred and new negotiations were necessary.

After peace had been imposed at Tabriz, Kazvin became a center of serious disturbance. At the same time certain tribes organized themselves into revolutionary bands under their chieftains. Of these latter, the most formidable was the Bakhtiari who started on a march toward Teheran. The Kazvin revolutionaries were also preparing to move on the capital. The ostensible purpose was to insure the carrying out of the constitutional program; but probably the real cause was jealousy of the success and prestige together with immunity from punishment won by the Tabriz revolutionaries. Still other bands were likely to join this modern *Anabasis*. The Azerbaijan struggle had cost the Shah his absolutism; now his throne itself was in danger. The safety of foreigners in Teheran was at stake in case the government should collapse.

To prevent the overthrow of the new constitutional régime and the substitution of no one knew just what, Russia determined on another move, and notified England of her intention. On July 3 a new circular note advised the powers that,

> In spite of the measures adopted on the advice of Russia and Great Britain by the government of the Shah for the restoration of representative government and the realization of necessary reforms, the revolutionary movement continues in the center of Persia.

It had therefore been decided that a Russian force should be sent to Kazvin (86 miles from Teheran). Its further advance

> can only ensue upon the demand of the Imperial Legation in Teheran in the event of the dangerous situation aforesaid arising. The commander of the force will be provided with the most definite instructions, which will emphasize that the exclusive object of the force must be the protection of the Russian and foreign legations, institutions, and subjects, while abstaining from any interference in the political struggle raging in Persia and generally in the internal affairs of Persia. The Russian troops will remain in Persia only until the lives and property of the Russian and other foreign diplomatic representatives and subjects and the safety of foreign institutions seems to be completely ensured.

In the early morning of July 4 a skirmish occurred twelve miles west of Teheran between the Persian Cossacks and the approaching revolutionary forces, or Nationalists, as they termed themselves. The Bakhtiari

had reached a point twenty miles south of the capital. Representatives of the English and Russian Legations went to endeavor to persuade both bands to stay their advance. Next day the emissaries returned bringing a reply in the form of eight demands. Owing to what they considered the unreasonableness of the demands, the Legations replied that they would undertake to lay before the Shah only two of them. The Nationalists' answer was uncompromising, indicating a determination to advance. The leader of the Bakhtiari told the English and Russian delegates he would meet them at Teheran. Word reached the capital the same day that the Russian force had disembarked on Persian soil and taken up its march towards Kazvin. Some thought this news would check a further advance of the Nationalists, since above all things they disliked the presence of a Russian army, not believing the Russian professions of sympathy with constitutionalism. Others believed it would precipitate an attack.

The next fighting occurred on July 11, when the Persian Cossacks guarding Teheran attacked the combined Bakhtiari and revolutionary position about 18 miles west of the capital. The struggle was not decisive, though the royalists seemed to get the better of their opponents. Two days later the Bakhtiari and revolutionaries having eluded the Cossacks by a flank movement in the night entered Teheran at six o'clock in the morning. The populace welcomed the invaders, received arms from them, and joined to resist the forces of their ruler, who had deserted them in the moment of danger, and for whom they felt no sympathy. He was then outside the city of Sultanatabad. Much desultory fighting took place on the streets, although the Russian officers in command of the royalists were ordered not to attack. The revolutionaries declared that they would remain on the defensive and that they were loyal to the Shah and wished merely to insure the triumph of the constitution. They assured the Legations that foreigners would be protected; and during the three days that they held the city while negotiations were pending their behavior was irreproachable. They maintained order, showed mercy to prisoners, and conducted a civilized warfare. Almost continuous fighting was kept up in one part of the city or another though there was no general engagement. Casualties on both sides probably did not exceed one hundred. There was little doubt of the final victory of the revolutionaries, though they were by no means sure of their ground. They placed little confidence in the assurance that the royalist forces would not attack.

The Russian government had hoped that a compromise would be reached and that the revolutionaries would not enter the city. In that event the dispatch of the Russian force was to remain a precautionary measure only. It was still questionable whether the troops would advance beyond Kazvin. That remained entirely at the discretion of the Russian Chargé at Teheran. Reinforcements were being assembled on the frontier to enter Persia only in case of the greatest necessity. The Russian press warned the government not to attempt any adventurous policy since such would end in disaster for Russia. England dispatched new forces to Bushire because of the disquieting situation at Shiraz.

In the British Parliament throughout the months of June and July, the representatives of the foreign office were frequently questioned and severely criticized. The Opposition could not believe that the Government was in the constant communication and close agreement with St. Petersburg which the ministers claimed. Or, they believed that if such frank interchange of view did take place, Russia was not sincere and was seizing pretexts for getting a large force into Persia preparatory to grasping control and annexing a goodly portion. The spectre of Russian aggression was revived. The Anglo-Russian Agreement, which for nearly two years had had such a magical influence, and had been accepted by practically all parties, was now looked upon as an astute Muscovite scheme for pulling the wool over the eyes of the British cabinet. Refusing to listen to the explanations and assurances of Sir Edward Grey in the Commons and the Earl of Crewe in the Lords, they became so clamorous that free discussion of the subject had to be blocked. Then a committee published a letter in the *Times* complaining of the Russian government's duplicity and the English Ministry's subserviency, and condemning the Anglo-Russian *entente*. Certain Opposition papers protested against the forthcoming mid-summer visit of the Czar to King Edward as a further attempt to blind England and impose on her.

In Russia, on the other hand, complaints were made that Isvolsky was dominated by London and that it was time to shake off an irksome tutelage. There was talk that a complete reconciliation with Germany would follow the Kaiser's visit to the Czar, then soon to occur, and that this would be at the expense of the English Agreement. The officials of both countries, however, insisted that good faith had been kept on both sides, that complete accord existed, and that the Agreement remained unshaken.

Some disquietude was caused by certain actions of the Ottoman gov-

ernment. Late in May a force of Kurds and Turkish regulars crossed the Persian frontier, probably because it was thought that Russia's intervention meant the partition of Persia. Being on the ground would strengthen the Turkish claim to the Turko-Persian disputed frontier strip, and might win still more. In June the Turkish Consul-General extended his protection over certain Persian revolutionary officers who had taken refuge with him, declaring that charges against them would have to be made through him. In July, orders were issued at Constantinople for strengthening the Ottoman forces in western Persia. The Russian government protested that this military occupation was contrary to the Anglo-Russian Agreement and to assurances which the Porte had given to those powers. But at the same time word came to the effect that the newly arrived Turkish consul had removed the Ottoman forces and declared his determination to prevent any infringement of the rights of Persia or of her inhabitants.

The three days of negotiation and fighting following the Nationalists' entrance into Teheran culminated on July 16 in the Shah's taking refuge in the Russian Legation and in a declaration of peace between the Nationalist invaders and the Cossack defenders. According to an arrangement beforehand the Shah's act was accepted by all as an abdication. Over the door of the temporary quarters of the Legation when he entered were suspended the crossed British and Russian flags, emblematic of the friendship of the two nations. Later in the day the National Council formally deposed Shah Mahomed Ali and chose in his stead his eleven-year-old son, Ahmed Mirza. The revolutionary leaders were given important places in the new government and the royalist army was retained in the service along with their recent antagonists.

Most affecting scenes occurred when the young Shah was separated from his parents to assume the unwelcome task which events had thrust upon him. It was arranged that the ex-Shah should reside in Russian territory. Difficulties which arose regarding the amount of the annuity that the new government would settle on him and over the possession of certain crown jewels caused him to tarry long after he ought, for the sake of peace and security, to have been bundled out of the country.

An official note from St. Petersburg on July 18 advised the powers of the changes which had taken place in Persia and of the hearty accord of England and Russia therein. Russian troops, which had not moved beyond Kazvin, were to remain in Persia until order should become com-

pletely re-established. The Persian minister in Paris paid a tribute to the complete straightforwardness with which Great Britain and Russia had carried out their joint engagements toward Persia. Early in August, Isvolsky who was in Paris attending the Czar on the latter's French visit, speaking in enthusiastic terms of the Anglo-Russian *entente*, said,

> If there had been no understanding between the two countries matters might have taken a very different turn.

Asked whether the *entente* would not assume a new form after the visit of the Czar to King Edward at Cowes (to take place a day or two later) he replied,

> A new form? No; why should it? * * * It will become more definite and stronger as a mere result of its happy consequences.

The new government in Persia has encountered many difficulties. It immediately set about preparations for summoning a new parliament, but the necessity for completely reorganizing the administration, for re-establishing order throughout the country, and for restoring the sadly disordered finances postponed for several weeks the election and assembling of the second Mejliss.

FRANCE AND THE UNITED STATES AT SAN FRANCISCO

If war is the result of misunderstanding between governments and their peoples, and of the truth of this there can be little or no doubt, it necessarily follows that the removal of international misunderstanding makes for peace, that every evidence of good understanding is a guarantee of peace, and that the manifestation of friendliness and friendship between two nations is not only a guarantee of continued peace but of the possibility of cooperation between the two countries and their peoples in the furtherance of international progress, which depends in no uncertain measure upon the maintenance of peace. Therefore, the presentation of a gold medal to the United States and the city of San Francisco on June 5, 1909, by the French ambassador on behalf of France, has an international significance as showing the continuance of a friendship between the two republics, coextensive with our national existence and indeed preceding it. A formal alliance ties the governments but does not necessarily unite the people and the invisible bonds of sympathy between France and the United States are evidence of a more real and enduring alliance than the formal alliance of the two countries by treaty.

For this reason, it seems appropriate to quote at some length from the addresses of Ambassador Jusserand and Judge William M. Morrow in order to disclose the spirit of the occasion. The thoughtful and impressive address of the ambassador shows the spirit prompting the presentation; the address of Judge Morrow shows the spirit in which the gift was received.

The French ambassador said in part:

I bring to you a message from France.

Since the early days of American independence no great event has happened in this country without awakening a friendly echo in distant France. The earliest message came from that noble-hearted young officer, Lafayette, who said: "When I heard of American independence, my heart enlisted." The heart of France herself enlisted then, officers and privates, soldiers and civilians.

The feelings thus begun have been happily continued, as has been shown from year to year by such events as the French National Assembly suspending its sittings at the news of Franklin's death, as the whole French nation going into mourning, with flags at half-mast, when Washington died, as the United States asking from France New Orleans and receiving Louisiana, as the sorrow felt at the death of Lincoln and a popular subscription being opened in France for an appropriate token of admiration and sympathy to be offered to his widow, and by many other proofs of persevering friendship.

America has reciprocated these feelings, the intimacy between the two nations has ceaselessly grown, especially since a similitude in institutions has brought closer together the two greatest republics of the world. When Lafayette died in 1834 the same honors were rendered in the United States to his memory "as we observed," we read in President Andrew Jackson's general orders "upon the decease of Washington, the father of his country and his contemporary in arms." France will ever remember that when she celebrated by a universal exposition in 1889 the anniversity of French liberty only one nation officially took part in the great concourse and that was the United States. She will never forget that when the unprecedented catastrophe of Mount Pelee at Martinique swept to death 35,000 of her sons no nation came so quickly and so generously to the rescue as the United States. And she will also remember what took place three years ago, when, according to a law of Congress, a medal was struck to commemorate, on the two hundredth anniversary of Franklin's birth, the way in which France had received him when he had come to tell the woes of the struggling thirteen states. As dearly as the gift itself will ever be cherished in France the words by which one of the wisest, best and greatest of your statesmen, the then Secretary of State, Elihu Root, presented it to the representative of France: "Take it," he said, "for your country, as a token that with all the changing manners of the passing years, with all the vast and welcome influx of new citizens from all the countries of the earth, Americans have not forgotten their fathers and their fathers' friends. Know by it that we have in America a sentiment for France; and a sentiment, enduring among a people, is a great and substantial fact to be reckoned with."

Deeply moved by such words, I rose to reply, and as I was expressing French gratitude, surrounded as I was by men and women representing all that was best and most beautiful in the nation, gathered together at Philadelphia, in the midst of that warmth, friendship and splendor, the thought flashed on me that at that very moment, on the shores of the Pacific, San Francisco was dying. Filled as well as all my nation with sympathy for such misery I expressed the hope that the next token of friendship between our two republics might commemorate, not the disaster, but the resurrection of your city so as to recall not only the American nation's sorrow, but her unfailing heroism and energy.

When I had thus spoken, on April 20, 1906, we knew but very imperfectly in the east what was happening in the west, but I knew too well the American temper to have any doubt as to what fight against adversity your shores were then seeing, and to what resurrection they would see later.

It was soon learned that the inhabitants of the stricken city had behaved indeed in such a way as to make the whole nation proud of them. When an unexpected danger or catastrophe overtakes a man he has sometimes not the tenth part of a second to make up his mind and decide what to do; and the question is an awful one: Will he be a hero? Will he prove a mean thing? His reason, his intelligence, his heart even, have no time to look the circumstances in the face and decide. What is it, then, that decides? It is his past life.

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What I thought and said happened to be so well in accord with the sentiments of my compatriots that the government of the French republic took my words to the letter. I had spoken of a medal to be struck to commemorate the resurrection of San Francisco; the resurrection has become a reality, and the medal, too; and I have been ordered to cross the continent and offer it to you in person.

And now let me do so, and permit me, Mr. Mayor, to place in your keeping this work, of which one single copy in gold has been made, destined "to the American people and the town of San Francisco." One side emblemetically shows your city rising from her tomb, and, powerful and handsome as ever, throwing off her shroud; one the other side the figure of France is seen presenting a branch of laurel to America.

Accept this gift, Mr. Mayor, and receive it you all, American citizens, in token that what once was still is; that we French continue, as of old, to feel with you in your moments of happiness or of anguish; and, if I may be permitted to appropriate the words of Elihu Root, let me say in my turn that "we have in France a feeling for America; and a sentiment, enduring among a people, is a great and substantial fact, to be reckoned with."

Long live your city, and may continuous prosperity be the lot of the American nation.

The address of Judge Morrow, more elaborate and more international in character than the remarks of Mayor Taylor, is quoted in part:

But what is the real significance of this occasion? It is certainly something more than a compliment to San Francisco. It is a reawakening of the goodwill

between the people of two great nations who already have a history of goodwill, and in many things a unity of purpose.

It is a pleasure to recall the fact that commencing with the very birth of the Republic, France and her people have on many occasions given evidence of their regard for this country and for our people. The services of France and her brave soldiers and sailors during the period of the Revolution has often been told, and need not again be rehearsed. The names of Lafayette, Rochambeau, and the Admiral Count de Grasse are always associated in the mind of every American with those of Washington, Franklin, and John Paul Jones.

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The important event in the history of the United States, and perhaps the most striking event in the growth of the nation to a world power, and the extension of its territory to the proportions of an empire, is directly connected with the history of the French nation and her relations with the United States.

Prior to April, 1803, the Mississippi River from its source near the Canada line to within about 200 miles of the Gulf of Mexico was the western boundary of the United States — the island of New Orleans and the west bank of the river belonged to France, altho at that time in the temporary possession of Spain. The mouth of the river and the last 200 miles of its course was therefore in French territory. This fact presented a very serious situation to Mr. Jefferson's administration. American commerce along the east bank of the Mississippi River was beginning to develop and demanded free access to the Gulf of Mexico that it might reach foreign ports. Whether that commerce should be free depended upon the friendship and goodwill of France. Mr. Jefferson by diplomatic action proposed to purchase New Orleans and share with France the control of the mouth of the Mississippi River.

What was the result of this proposal? France did more than was expected. She transferred to the United States the island of New Orleans and all the territory belonging to France west of the Mississippi River — a territory almost as great as the combined area of France, Germany, the Netherlands, Switzerland, Italy, Spain, England, Ireland, Scotland, and Wales. As Mr. Justice Brewer once said: "This transfer took place not as a result of a conquest, nor at the end of a war, but by voluntary contract and purchase;" a fact not without significance when we remember that this peaceful transfer, this relinquishment of a vast territory to the new Republic was made by the greatest soldier of modern times. This transfer, said Mr. Brewer, "stands out unique in peaceful beauty, solitary amid the awful grandeur of bloody centuries of war and conquest."

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The construction of the Panama Canal is another important event in the history of the United States, wherein the United States has become the successor in interest of French enterprise. This great work will soon be completed, and the commerce of the Pacific become the predominating factor in the world's future progress, and the present occasion is opportune to express the hope that the commerce of nations will be admitted to transit through that canal upon such terms of equality and conditions of neutrality that the peace of the world be further assured and the wise and beneficent policy of France in that behalf

further confirmed and established. Then will San Francisco in the fullness of her pride realize the prophecy of her greatness and become the Paris of the New World in commerce, industry, art, science, and literature.

France stands for high ideals, and among these the ideals of art, science, and literature, but above all the ideal of peace and goodwill among nations. But she does more than declare a policy — she practices the arts of intercourse with other nations upon terms that make such a policy possible of realization. She entrusts her high commissions to distinguished men who represent not only the state, but the force and character of her liberal institutions. We have therefore been honored on this occasion by the presence of His Excellency, Mr. Ambassador Jusserand, for whom we entertain personally and officially the highest consideration. * * *

THE IBERO-AMERICAN INSTITUTE OF COMPARATIVE POSITIVE LAW

The essential unity of the Spanish-speaking members of the Latin family of nations, and the important rôle which they are destined to enact in the future of international relations and law, is one of the great facts in the ever-nearing realization of the poet's vision of the "Parliament of mankind, the federation of the world." The significance of the entry of Latin America upon the world-stage of international juridical relations, is made the subject of a very impressive study by Señor Alejandro Alvárez in the April issue of this JOURNAL.[1] Its perusal will well reward those who desire a scholar's understanding of so significant a movement.

Exactly in harmony with what may be called this psychosis of the Latin world, and a capital step in the process, is the recent inauguration in the mother country of Spain, of an international law institute, designed to organize and centralize this vital international process. This is the Instituto Ibero-Americano de Derecho Positivo Comparado, lately organized in Madrid, and no doubt designed, not less than destined, to exercise a powerful influence in this movement of the Spanish nationalities upon the international arena.

In December, 1908, this Institute was founded at Madrid by a number of distinguished Spanish publicists and jurists, all occupying high professional and civic stations. The founders of the Institute, and members of its governing body, are the following: Exmos. Señores: Segismundo Moret, President of the Atheneum of Madrid; Rafael Conde y Luque, Rector of the Central University; Gumersindo de Azcárate, President of the Institute of Social Reforms; Alejandro Groizard, President of the

[1] 3:269.

Academy of Natural and Political Sciences; Eduardo Martínez del Campo, President of the Supreme Court; Eduardo Dato é Tradier, President of the Royal Academy of Jurisprudence; Luís Díaz Cobeña, Dean of the Illustrious College of Lawyers of Madrid; Bruno Pascual y Ruilópez, Dean of the Illustrious Notarial College of Madrid; Alejo García Moreno, Publicist and Professor of the Central University; the latter being the Secretary of the Institute.

The program of the Institute, setting forth the purposes and scope of its organization, as expressed in its charter, may be given here in résumé, for the more exact information of any who may be specially interested, and for a future record of the Institute. It is first declared to be created under the name above given, and that its central domicile shall be at Madrid, Spain, with national delegations in the capitals of such countries as wish to establish them.

II. The principal objects of this association shall be:

1st. To facilitate frequent and mutual communication between professionalists and juridical societies, both directly and through the national delegations or their presidents.

2nd. To stimulate among the Ibero-American peoples the study and discussion of the juridico-social problems of present interest, seeking to unify or harmonize, as far as possible, their solution, and endeavoring to formulate such solutions into rules of positive law.

3rd. To facilitate the reciprocal knowledge of the most important laws of all the nations, and the answering of legal questions or consultations, through the committees or individual members whom the Central Junta, or in their case, the delegations of the several states, may designate for that purpose; and to gather and furnish data relating to juridical literature.

4th. To aid the publication of, or publish on economical conditions, a review in which, among other things, sufficient notice shall be given of new laws, and of modifications or innovations which may be made in the present laws of all the states (preferably those of Ibero-America), and which shall serve as the official organ of the association.

III. The Institute shall be composed of two classes of members, numerary (paying), and corresponding. Spaniards and foreigners who possess the qualifications required by article IV, and who request their enrollment as such, may be numerary members. Those foreigners only who have such qualifications, and who do not *expressly* ask to be numeraries, shall be corresponding members. The title of honorary members

or patrons of the Institute may also be given to those persons or juridical societies who render to the association any of the services mentioned in the by-laws or regulations.

Spanish numerary members shall pay annually in advance twelve pesetas, and the foreigners fifteen francs.

IV. To become numerary or corresponding members, the applicant must possess, besides the qualifications indicated in the preceding article, the following: 1st. Be a lawyer. 2nd. Have written and published important legal works. 3rd. Edit or have edited some legal publication.

Article V is temporary and unimportant.

VI. In the Central Junta as well as in the delegations which think it advisable, all the members shall be divided into sections, every member selecting the one which he prefers. These sections may be: 1. Of civil law; 2. Of commercial and industrial law; 3. Of penal law; 4. Of international law; 5. Of comparative legislation; 6. Of judicial law, jurisprudence, the sending and compliance with letters rogatory (*exhortos*), and the execution of foreign judgments; 7. Of legal literature. No one may belong to more than two sections. These will elect their president and secretary and other officers.

VII. The national delegations may organize and govern themselves freely in everything that is not contrary to the general by-laws. The lists of members of such delegations shall be sent to the Central Junta, to be recorded as corresponding members if they have not requested to be included among the numerary members. To cover the expenses, over ordinary receipts, occasioned by the publication of the review and other general services of the Institute, each delegation shall contribute the annual quota which it may determine, according to its circumstances.

Articles VIII and IX treat of the organization of the Central Board of Directors — La Junta Directiva Central.

Rights and duties of the members of the Institute

X. Every numerary member and patron of the Institute shall have the right: 1. To receive *gratis* the review, the organ of the association; 2. To have answered for him the questions and consultations in regard to the law in force in any state where there are members of the Institute. The general regulations shall fix the amount, form of payment and purpose (*destino*) of the fees for the answer to consultations and for opinions; 3. To receive a certificate and personal card, if he is a numerary member, and only a card which accredits his membership, if he is a

corresponding member; 4. To attend the general meetings (*Juntas generales*), to express his opinions and vote upon questions which may be discussed, in the election of members of the Junta, etc.; 5. To receive replies and attention in the form which may be established, when he addresses the Junta Central, or the foreign delegations, especially in regard to matters concerning the association; 6. To be given notice in the review, of every work of a legal character which he may publish, and of which he sends a copy for the library. Corresponding members shall have the same rights, except that mentioned in number 1.

XI. The duties of the members shall be: 1. To respond, unless in case of a just excuse, to the questions, consultations and legal opinions required of him by the Junta Central or the national delegation, receiving the fees which the regulations establish; 2. To pay in advance, if a numerary, the annual quota to which he is subject; 3. To send *gratis* to the library of the Junta Central one copy of every book or work which he may produce, and establish an exchange with the review, of any legal publication which he may publish; 4. To contribute, so far as in his power, to the welfare and good name of the Institute, and attend upon the foreign members who may be transiently in the place where he resides. The special duties of the members of the national delegations shall be determined by their local Juntas.

The articles XII, XIII, XIV and XV are local and transitory, and need not be further noticed. It is provided in article XV, that the Institute shall enter upon its regular course of work on the first of July, 1909, on which date its solemn opening will take place.

A few words remain to be said of the secretary of the Institute, Exmo. Señor Don Alejo García Moreno, and of his colossal work. He is a gentleman of vast and scholarly attainments and prodigious literary activity. For a number of years (since 1901) he has been the editor of the *Revista de Legislación Universal*, which, as its name indicates, is a review of comparative legislation of all the countries of the world. It is this *Revista* which now becomes the official organ of the Institute. Besides this important work, Sr. Moreno is the author of a very monumental and notable work, known throughout the Spanish Americas under the title of "Compilation of Constitutions, Codes and Special Laws of the European States," (modern as well as ancient), which have been translated into Spanish and published by the indefatigable Sr. Moreno. He is now piling Pelion on this Ossa by the addition to his "Collection," of all the like laws of the states of America; and since 1894 he publishes

in connection with this work an "Anuario" of all the new codes and special laws of importance enacted during each year by all the countries.

Besides the higher purposes of membership in such an Institute, there are thus apparent many practical advantages connected with the new Institute of Comparative Law, with its great collections of the institutions and laws of all the world, in the access which membership gives to these data, valuable alike to the lawyer and the legislator, in knowing the systems of laws which rule the countries of the world, and in being able to select from them such precepts as may be useful in improving his own legislation. The advent of the Instituto Ibero-Americano will without doubt be warmly welcomed.

FREDERIC DE MARTENS

The death of Professor Frederic de Martens on June 20, 1909, has deprived international law of one of the admitted masters of the science, and international arbitration of its most distinguished and experienced partisan. In important conferences of recent years Professor de Martens was the representative of Russia, and his knowledge of affairs from their practical conduct, his desire to produce acceptable results even at the sacrifice of a principle correct in theory or a compromise of an extreme right, his ability to understand the motives of men and his knowledge of international situations, his sympathy with all progress making for peace and the peaceable settlement of international disputes, counted for much in the success of any transaction with which he was concerned.

Born in Livonia in 1845, educated in Russia, and ripened by study in foreign universities, he entered the department of foreign affairs in 1869, and remained as counsellor and permanent member until his recent death. He thus obtained a practical knowledge of the channels through which diplomacy works and modern international law is developed, a knowledge which stood him in good stead both as delegate of his country in im portant conferences and in the many arbitrations with which he was connected.

The theoretical principles of international law, however, were not lost sight of in their practical application, for in 1871 he became an instructor at the University of St. Petersburg, and professor in 1873. His first claim to distinction was based upon his theoretical work in the domain of international law and it was only later after he had acquired European reputation as a professor and writer upon international law

that he achieved international distinction and the title of Chief Justice of Christendom.

His first great works of a scientific nature were his "Consuls and consular jurisdiction in the Orient," (1873), and his "Collection of treaties and conventions concluded by Russia with foreign powers," (1874–1909, 15 volumes), amply supplied with historical and critical annotations. His most important contribution to international law is undoubtedly his "Treatise on international law" (1883–1887), which has been translated into German, French, Spanish, Japanese, Persian, Servian, and Chinese. A careful analysis and statement of the aims and purposes of this work by Rivier will be found in von Holtzendorff's "Handbuch des Völkerrechts," volume one, pp. 521–522, to which the reader is referred.[1]

His diplomatic career properly so-called began in 1874 when he was Russian delegate to the conference at Brussels and had a large part in shaping the declaration of Brussels Concerning the Laws of Land Warfare. In 1887 he was delegate to the International Red Cross Conference at Carlsbad; in 1888 he represented Russia at the International Conference of Maritime Law; in 1899 and 1901 he was likewise Russian representative at the Conference on the Abolition of the Slave Trade in Africa; in 1899 and 1907 he was Russian plenipotentiary at the Hague Peace Conferences; in 1906 he was a member of the International Conference for the Revision of the Geneva Convention; and in 1906–07 performed acceptably the difficult task of conferring with the various European states upon the programme to be submitted to the Second Hague Conference. Great as were his services in all of these conferences, he achieved his greatest distinction at the First Hague Conference of 1899, where, as president of the second commission, his knowledge, his tact, and his great ability brought to successful conclusion the convention respecting laws and customs of war on land. But great as were his

[1] Among the other works of M. de Martens are: Treaties with Austria, vols. 1–4, 1874–1878; Treaties with Germany, vols. 5–8, 1880–1888; Treaties with England, vols. 10–12, 1892–1898; Treaties with France, vols. 13–14, 1902–1905; The law of private property in time of war, 1869; The war in the Orient and the Brussels Conferences, 1874–1878; Russia and England in Central Asia, 1879; The conflict betwen Russia and China, its origin, development and universal extent, 1880; The Egyptian question and international law, 1882; Mémoire on the telegraph in China, 1883; The Congo Conference at Berlin and the colonial policy of modern states, 1886; Mémoire on the Zappa affair, 1893; The Peace Conference at the Hague, 1901; Through justice to peace, 1907.

services in the commission over which he presided, his services in the third commission dealing with arbitration were still greater, for it is common knowledge that he prepared the various Russian memoranda on arbitration presented to the conference, and was in no small sense of the word the framer of the convention for the peaceful settlement of international disputes. His profound knowledge of international law, his experience as arbitrator in international arbitrations — during the session of the conference he was president of the Venezuelan arbitration in Paris — gave him commanding influence, and caused him to be looked upon as the embodiment of arbitration versus war. Impaired health undoubtedly accounts for the fact that he played a less conspicuous rôle in the second than in the first conference.

In the domain of arbitration he was a well-known and highly respected figure. He decided the *Costa Rica Packet* case between Great Britain and Holland, (1897); he was president of the Venezuelan Arbitration of 1899; and was arbitrator in the Pious Fund Case (1902) and the Venezuelan preferential cases, (1903) before the permanent court at The Hague, an institution in no small measure due to his initiative.

It is evident, therefore, that he rendered great service to diplomacy, to the science of international law, and to the cause of international arbitration, and his death is a distinct loss to those who believe that law, not force, should rule the world.

THE VENEZUELA CASES

The relations of the United States to Venezuela and in particular the nature and the status of the five claims of American citizens and companies against Venezuela which have disturbed the relations of the two countries for several years past and which finally resulted in the severance of diplomatic relations in June, 1908, were discussed in the Editorial Comment of this JOURNAL for April (1909, p. 436), under the caption, "The Venezuelan Situation." As was there pointed out the Honorable William I. Buchanan, high commissioner on the part of the United States, after a protracted and difficult negotiation from December, 1908, to February, 1909, succeeded in effecting a settlement of two of the then pending claims, the claim of the New York and Bermudas Company on account of the sequestration of the company's property, and the claim of A. F. Jaurett on account of his summary expulsion from Venezuela. At the same time Mr. Buchanan also negotiated and signed a protocol for

the settlement by way of arbitration of the three remaining claims, namely, the claim of the Orinoco Steamship Co., the claim of the Orinoco Corporation and its predecessor companies, and the claim of the United States and Venezuela Co., commonly called the *Crichfield* Claim. It was felt during these negotiations that at least two of these cases were eminently cases for settlement out of court along the lines of the settlement of the New York and Bermudas Co. But inasmuch as the complicated nature of the cases did not permit of their settlement within the time at Mr. Buchanan's disposal it was thought best to include them in the protocol for arbitration specifically providing, however, in article 12 of the protocol that nothing contained therein should preclude Venezuela "during the period of five months from the date of this protocol from reaching an amicable adjustment with either or both of the claimant companies referred to," namely, the Orinoco Corporation and its predecessors, and the United States and Venezuela Co. The result has amply vindicated the judgment of the negotiators and affords a new illustration of the value of the Hague Court not merely as a tribunal for the settlement of international difficulties, but as a standing inducement for the amicable adjustment of international difficulties of a judicial nature by the parties concerned.

In pursuance of the terms of article 12 of the protocol five months were allowed for the settlement of the Crichfield and Orinoco Corporation cases. Negotiations were delayed, however, owing to the difficulty of the cases and the numerous interests involved which it was necessary to consult at every step and it became necessary for the two governments twice to extend the term allowed by the protocol for settlement, first for one month, and later for thirty days additional, from July 12, the last date allowed for settlement under the terms of the protocol. Settlement was first reached in the Crichfield case, the formal protocol of settlement being signed August 21, 1909. For a brief statement of the facts of this case reference is made to the Editorial Comment mentioned above. It is sufficient for our present purpose to recall that the Crichfield case was a case in which an American company, the United States and Venezuela Co., held a mining concession and a railway concession in connection therewith, it being expressly stipulated that the company should not be taxed at a higher rate than that provided by the then-existing law. The Castro government proceeded to raise the tax rate and to give practical application to the doctrine of *McCulloch* and *Maryland*, "the power to tax is the power to destroy." The present government of Venezuela

offered to settle this case upon the basis of an extension of the concession, but owing to the financial condition of the company, due to the arbitrary acts of the Castro government, the company felt unable to invest the additional capital necessary to restore the plant to working order and carry on the business. Accordingly the Venezuelan government offered a cash settlement, the sum to be paid to purchase alike the property and the claim of the company. The protocol of settlement fixes the amount to be paid by Venezuela at $475,000 American gold, payable in the office of the Secretary of State at Washington, in eight equal instalments The first payment of $59,375 was made at once and the sum remaining is to be paid in seven equal annual instalments.

In noting the settlement of this case it is a satisfaction to add that it appears to have been a case in which the American concessionary loyally lived up to the terms of the concession and abstained from all intermingling in local politics, and in general discharged its full duty to the country in which it operated so long as it was permitted to operate.

The case of the Orinoco Corporation proved even more difficult of settlement. It will be remembered that this case grew out of the so-called *Fitzgerald* concession, covering a large portion of the delta of the Orinoco River originally granted to one Cyrenius C. Fitzgerald, in 1883. This concession has been held in turn by the Manoa Co. (Limited), the Orinoco Co., the Orinoco Co. (Limited), and the Orinoco Corporation, all American companies with a large preponderance of American stockholders. During practically the entire history of the concession the concessionary company was harassed by interference on the part of the Venezuelan authorities which sometimes took the form of physical interference with the possession of the company, sometimes the form of conflicting concessions which clouded the company's title and prevented it from obtaining the financial support requisite for the development of the concession. For a long time attempts were made to reach a settlement on the basis of a modified concession, covering a reduced territory, so as to eliminate some of the conflicting concessions. The parties were, however, unable to reach an agreement upon the terms of the proposed new concession and the safeguards by which it was to be surrounded, and the government of Venezuela foreseeing ultimate failure along this line of negotiation finally offered a cash settlement as in the Crichfield case. The amount to be paid was fixed at $385,000, American gold, payable at the office of the Secretary of State at Washington, one-eighth to be paid in cash and the remainder in seven equal annual instalments.

It may perhaps be appropriately and fairly added that the satisfactory and amicable settlement of these two cases through the payment on the part of Venezuela of a total of $860,000 affords a striking vindication of the attitude of the Department of State in presenting these claims and pressing for an agreement for their arbitration, as it must be remembered that Venezuela makes these settlements not under threat of continued diplomatic pressure with its potential resort to force, but purely and simply in order that it may not be necessary to arbitrate these cases at The Hague. Whether or not the cases would have been won had they gone to arbitration it is idle to speculate, but it seems reasonably obvious that if the defendant government is willing to pay $860,000 in settlement rather than to arbitrate, the plaintiff government was justified in requesting that the cases be arbitrated.

On the other hand it is a pleasure to add that this settlement affords a striking evidence of the loyalty and good faith with which the present government of Venezuela is carrying out its obligations under the Buchanan-Guinan protocol of February 13, 1909, in accordance with which, as before noted, special provision was made in article 12 for the possible settlement of these two cases. The present government of Venezuela has by its course in its dealings with the United States manifested to foreign nations a sense of fairness and reasonableness which points clearly to the evident fact that Venezuela has entered into a new era in her foreign relations.

There remains but one of the five cases which formed the subject of these negotiations for which no special provision for settlement was inserted in the protocol of February 13, and which must go to arbitration at The Hague unless the two governments are yet able to reach some amicable adjustment out of court. This is the case of the Orinoco Steamship Co. This case has excited much interest and been the subject of much discussion because it is the case in which the United States is seeking the revision of the award of the umpire of the United States and Venezuela Mixed Commission of 1903, on the ground, briefly stated, that the umpire rendered an award in disregard of the terms of the protocol of submission and in the teeth of its express terms. The Department of State has received a good deal of gratuitous criticism in connection with this case on the ground that in asking this revision it was somehow imperilling the sanctity of international awards. This criticism is far from well taken since it is remembered that all authorities agree that there are certain well-established grounds, and universally admitted

grounds, for the revision of an international award and that in accordance with the terms of the Buchanan-Guinan protocol of February 13, the Hague court is as a preliminary question, to decide whether or not "in view of all the circumstances and under the principles of international law" the decision of the umpire, Dr. Barge, is final, or whether it is properly subject to revision. If the Hague court holds the decision to be final the case is closed. If on the other hand the court sustains the contention of the Department of State that the decision is subject to revision, the court is to proceed to a reconsideration of the entire case upon its merits. It is submitted that far from imperilling the sanctity of international awards or the cause of international arbitration, the Department of State has done a great service to international law and international arbitration in endeavoring to secure a judicial determination by the Hague tribunal, the ultimate authority in international law, of the grounds upon which an international award may be set aside, at least so far as these grounds are alleged in this particular case.

It is a matter of general satisfaction that the relations between the United States and Venezuela, so long disturbed by the claims which have now been either adjusted or put in the way of settlement through arbitration at The Hague, should as the result of the spirit in which the negotiations leading to the settlement have been handled on both sides, be once more reestablished upon a basis of genuine regard and cordiality.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: ***Ann. sc. pol.***, Annales des sciences politiques, Paris; ***Arch. dipl.***, Archives diplomatiques, Paris; *B.*, boletín, bulletin, bollettino; *B. A. R.*, Monthly bulletin of the International Bureau of American Republics, Washington; *Doc. dipl.*, France: Documents diplomatiques; *Dr.*, droit, diritto, derecho; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain: Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil général de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs-G.*, Reichs-Gesetzblatt, Berlin; *Staatsb.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain: Treaty Series.

February, 1909.

1 SWEDEN. Adhesion to international convention signed at The Hague, December 21, 1904, to exempt hospital ships from port dues in time of war. *Monit.*, February 12. *See March 26, August 14, 1907, and February 26, 1909. Staatsb.*, 1908, No. 120; for procès-verbaux of the international conference respecting hospital ships held at The Hague December, 1904, *see Arch. dipl.*, 101:301; *id.*, 101:241.

22 BELGIUM—LUXEMBURG—NETHERLANDS. Agreement signed at Brussels extending the telegraphic convention signed at The Hague, December 17, 1890, at Brussels, December 20, 1890, and at Luxemburg, December 19, 1890, until one of the contracting governments shall give one year's notice of its intention to terminate it. *Staatsb.*, 1909, No. 73. Under article 17 of the international telegraphic convention signed at St. Petersburg, July 22, 1875. *Monit.*, February 28.

26 PERSIA. Deposit at The Hague of ratification of international convention signed at The Hague December 21, 1904. Exemption of hospital ships in time of war from port dues. *Monit.*, February 12. *See February 1, 1909.*

March, 1909.

5 BRAZIL—COLOMBIA. Ratification by Colombia of treaty signed at Rio de Janeiro, August 21, 1908. Fluvial commerce and navigation. *B. del ministerio de relaciones exteriores,* 2:504, 546.

10 COLOMBIA—FRANCE. Ratification by Colombia of general arbitration treaty signed at Bogota, December 16, 1908. *B. del ministerio de relaciones exteriores,* 2:508, 552.

April, 1909.

2 MEXICO—NETHERLANDS. Ratifications exchanged at Mexico of extradition convention signed at Mexico, December 16, 1907. *Staatsb.,* 1909, No. 118.

29 BELGIUM—FRANCE—GREECE—ITALY—SWITZERLAND. Ratifications deposited at Paris of the monetary convention signed at Paris, November 4, 1908. Belgian law approving, March 13. *Monit.,* May 9. This convention is additional to the monetary convention signed November 6, 1885. *See March 22, 1909.* The ratifications were to have been deposited March 25, 1909, but the Italian government requested postponement and a declaration was accordingly signed at Paris, March 24, 1909, extending the time. French decree, May 1, taking effect May 15. *J. O.,* May 2.

30 FRANCE. Decree promulgating convention respecting civil procedure signed at The Hague, July 17, 1905. *J. O.,* May 2.

May, 1909.

1 BRAZIL—PANAMA. General treaty of arbitration signed.

1 GREAT BRITAIN—UNITED STATES. Denunciation of the agreement of November 19, 1907, respecting (1) commercial travelers' samples entering the United Kingdom, (2) import duties on British works of art entering the United States. *Treaty ser.,* 1909, No. 13; *id.,* 1907, No. 44.

1 SALVADOR—UNITED STATES. Ratification by Salvador of treaty of general arbitration signed at Washington, December 21, 1908. *Diario oficial,* May 7.

1 FRANCE—GREAT BRITAIN—ITALY. French decree approving two arrangements signed at London, December 13, 1906, respecting (1) Abyssinia and (2) traffic in arms on the Somali coast. *J. O.,* May 2, 1909; *N. R. G.,* 2:35:556; *Treaty ser.,* 1907, Nos. 1 and 2; *Q. dipl.,* 11:310; *Arch. dipl.,* 101:47, 51; *State papers,* 76: 315. Under the first agreement, the three powers undertook to

May, 1909.

respect and endeavor to preserve the integrity of Abyssinia; to act so that industrial concessions granted in the interest of one of them may not injure the others; to abstain from intervention in Abyssinian affairs; to concert together for the safeguarding of their respective interests in territories bordering on Abyssinia; and they make agreements concerning railway construction in Abyssinia and equal treatment in trade and transit for their nationals.

1 GERMANY—GREAT BRITAIN. Postal service of boxes with declared values up to £400 came into force. A similar service already exists between the latter country and Belgium, France and Netherlands. *L'union postale*, June 1.

1 BELGIUM—SERVIA. International collection order service came into force. *L'union postale*, June 1.

1 FRANCE—GERMANY. First meeting of court of arbitration at The Hague to which was submitted the Casablanca incident. M. Hammarskjöld, president, M. Renault, Herr Kriege, Sir Edward Fry and Signor Fusinato compose the court. *See May 22, 1909.*

2 FRANCE—NORWAY. French decree approving declaration signed at Paris, February 20, 1909. *J. O.*, May 3, 4. Takes effect May 4, 1909, and of equal life with treaty of commerce signed December 30, 1881.

3 SECOND NATIONAL PEACE CONFERENCE at Chicago. The first was held at New York in 1907.

5 PERSIA. Proclamation issued according a constitution to the people. *Times*, May 6.

9 INTERNATIONAL EXPOSITION OF IMPROVEMENTS OF CITIES AND RESORTS opend at St. Petersburg. To continue until September 14.

10 CHINA—RUSSIA. Preliminary agreement signed at Peking. Eighteen articles. The Kharbin municipality will hereafter be administered on the basis of an international settlement under regulations, the negotiations for which are to commence within one month. The agreement admits China's right to appoint a director of the Chinese Eastern Railway, as provided by the agreement of 1896, to reside in Peking, or Kharbin. *Times*, May 12: text, *Times*, June 1.

10 PERSIA. Decree proclaiming general amnesty for political offences, with license for exiles to return. *Times*, June 30.

May, 1909.

10 BELGIUM—LUXEMBURG. Act signed at Brussels additional to the postal convention signed March 6, 1879. *Monit,* May 15. To take effect July 1, 1909.

11 SOUTH AFRICA. Amended draft of the Constitution signed at the second session of the National South African Convention at Bloemfontein. *Times,* May 12; *Cd.,* 4721.

12 FRANCE—VENEZUELA. The Venezuelan government and the French Cable Company signed a compromis with a contract annexed The company opens its regular service. *Times,* May 13.

13 BRAZIL—ECUADOR. Treaty of arbitration signed at Washington.

13 AUSTRIA-HUNGARY—UNITED STATES. Ratifications exchanged at Washington of arbitration convention. Signed at Washington, January 15, 1909; ratification advised by the Senate, January 20, 1909; ratified by the President, March 1, 1909; ratified by Austria-Hungary, April 17, 1909; proclaimed by the President May 18, 1909. *U. S. Treaty ser.,* No. 524.

14 UNITED STATES—URUGUAY. Ratifications exchanged at Montevideo of naturalization convention signed at Montevideo, August 10, 1908; ratification advised by the Senate, December 10, 1908; ratified by the President, December 26, 1908; ratified by Uruguay, May 14, 1909; proclaimed by the President, June 19, 1909. *U. S. Treaty ser.,* No. 527.

15 FRANCE—ITALY. Agreement signed at Rome. Customs at Lanslebourg. *Mém. dipl.,* May 23.

15 DANISH WEST INDIES—NETHERLANDS. Direct exchange of money orders established. *L'Union postale,* 34:79.

17 AUSTRIA-HUNGARY—GREAT BRITAIN. British order in council extending to Austria-Hungary application of the Patents and Designs Act, 1907. *London Ga.,* May 21, 1909.

17 SIXTH INTERNATIONAL COTTON CONGRESS of delegated representatives of master cotton spinners and manufacturers' associations opened at Milan. Adjourned May 19. *Times,* May 18, 20. *See June 1, 1908.*

18 ABYSSINIA. Proclamation of Lidj Eyassu, son of Ras Mikhael and Waizaro Shoa Rögga, as successor to his grandfather Emperor Menelik and announcement of his betrothal to the Princess of the Tigré, granddaughter of the late Emperor John and niece of Empress Taitou. *Times,* May 26.

May, 1909.

18 GERMANY. Reichstag passed international copyright convention. Signed at Berlin November, 1908. *See March 2, 1909.*

18 BRAZIL—COSTA RICA. Treaty of arbitration signed at Washington.

19 BELGIUM—URUGUAY. Uruguay denounced treaty of commerce and navigation signed September 16, 1853, and additional articles signed February 21, 1857. Takes effect May 19, 1910. *Monit.*, May 28, 1909.

19 NETHERLANDS. Denouncement of international sanitary convention signed December 3, 1903, as regards the Dutch West Indies. *Monit.*, May 21, 1909. *See February 9, 1909.*

22 FRANCE—GERMANY. Award at The Hague of the court of arbitration to which were referred the questions resulting from the events at Casablanca, September 25, 1908. *Times*, May 24; *J. des débats*, May 25; this *Journal*, 3:755. *See May 29, 1909.*

25 ITALY signed at London the Declaration of London of February 26, 1909, respecting rules for an international prize court. Spain signed April 24, 1909.

27 SEVENTH INTERNATIONAL CONGRESS OF APPLIED CHEMISTRY, at London. Adjourned June 2. Prior congresses were held at (1) Brussels, 1894; (2) Paris, 1896; (3) Vienna, 1898; (4) Paris, 1900; (5) Berlin, 1903; (6) Rome, 1906. *Times*, May 28, 29. Next congress in the United States.

27 BELGIUM—BULGARIA. Ratifications exchanged at Sofia of treaty of commerce and navigation. Signed at Sofia, August 29, 1908. *Monit.*, June 3, 1909.

27 BELGIUM—BULGARIA. Ratifications exchanged at Sofia of extradition treaty signed at Sofia, March 28, 1908. *Monit.*, June 5.

27 FRANCE—ITALY. Telegraphic convention signed at Paris; signed at Rome February 24, 1909.

28 CUBA. Ratification of the international convention signed at Brussels July 5, 1890. International union for publication of customs tariffs. *B. oficial de la secretaria de estado*, July, 1909.

29 FRANCE—GERMANY. Protocol signed at Berlin giving effect to the Hague award regarding the Casablanca incident. *Times*, May 31; *Q. dipl.*, 27:753; *Mém. dipl.*, May 30. The deserters from the Foreign Legion who were tried and found guilty by a court-martial at Casablanca have been pardoned by the President of France. *Times*, July 30.

May, 1909.

31 TWENTIETH INTERNATIONAL CONGRESS OF MINERS opened at Berlin. *Times* June 1, 5. Next Congress at Brussels in 1910. *See June 8, 1908.*

June, 1909.

1 NORWAY—URUGUAY. Direct money order service on the basis of the international arrangement of Rome came into force. *L'union postale*, June 1.

2 FRANCE. Abeshr, capital of Wadai, taken by storm by a column of French tirailleurs. The provinces of Tibesti, Borku and Wadai were assigned to France under the Anglo-French agreement signed March 21, 1899, which was concluded after the settlement of the Fashoda incident. Of these three provinces Wadai was the only one in which French influence had not been completely asserted. *Times*, July 23.

6 INTERNATIONAL DAIRY CONGRESS opened at Budapest. *See September 17, 1907.*

6 SIXTH INTERNATIONAL CONGRESS ON THE SCIENCE OF INSURANCE, at Vienna. *Times*, June 8.

8 BELGIUM. Law relative to Belgian nationality. *Monit.*, June 17; *Cd.*, 7352, 4730.

8 HONDURAS—UNITED STATES. Proclamation by the President of the United States of the naturalization convention signed at Tegucigalpa, June 23, 1908; ratification advised by the Senate, December 10, 1908; ratified by the President, December 26, 1908; ratified by Honduras, April 7, 1909; ratifications exchanged at Tegucigalpa, April 16, 1909. *U. S. Treaty ser.*, No. 525.

10 JAPAN signed Declaration of London of February 26, 1909, respecting rules for international prize court.

14 BRAZIL. Death of President, Dr. Affonso Penna. Succeeded, in accordance with the constitution, by the vice-president, Dr. Nilo Peçanha. *Q. dipl.*, 27: 2.

15 RUSSIA—UNITED STATES. Proclamation by the President of agreement signed at St. Petersburg, June 25 (12), 1904; ratification advised by the Senate, May 6, 1909; ratified by the President, June 7, 1909. *U. S. Treaty ser.*, No. 526. To regulate the position of corporations or stock companies and other commercial associations.

June, 1909.

16 FOURTH QUINQUENNIAL INTERNATIONAL CONGRESS OF WOMEN at Toronto. *Times,* June 17, 18, 24. Next meeting at Rome, 1914. *Harper: The international council of women, North American R.* 188:650.

17 MOROCCO. Troops of Mulai Hafid defeated. *Times,* June 22. Moroccan pretender, Bu Hamara.

18 ARGENTINE REPUBLIC—GREAT BRITAIN. Permanent arbitration treaty signed at Rio de Janeiro. *Times,* June 19.

18 BRAZIL—GREAT BRITAIN. Arbitration convention signed at Rio de Janeiro. *Times,* June 21.

19 DOMINICAN REPUBLIC—UNITED STATES. Extradition treaty signed at Santo Domingo. Ratification advised by the United States Senate July 26, 1909.

20 PROFESSOR FREDERICK DE MARTENS died. Born in 1845, entered the Russian ministry of foreign affairs in 1868 and became Professor of international law in the University of St. Petersburg in 1871. De Martens was a member of the Brussels conference of 1874, of the Red Cross Conference at Karlsruhe in 1887, of the Maritime Conference of 1889, of the 1890 conference for the suppression of the white slave traffic, and represented Russia in both The Hague Conferences. In 1897 he was a member of the board which settled the "*Costa Rica*" ship dispute between Great Britain and Venezuela; in 1903 member of tribunal to settle preferential payment controversy between Venezuela and Great Britain, Germany and Italy. Author of *Le droit international des nations civilisées* (2 vols. 1884–1888) and editor of collection of treaties between Russia and foreign powers, 15 volumes.

20 CRETE. Turkey invites Great Britain, France, Russia and Italy to discuss with the Porte proposals for solution of the Cretan difficulty on lines to preclude annexation of the island by Greece and to guarantee maintenance of Turkish sovereign rights. *Times,* June 22, 23, 26, July 7. This circular note requests abrogation of the arrangements for the appointment of a High Commissioner for Crete at the instance of the King of the Hellenes, the administration of justice in the name of King George and the use of postage stamps bearing his portrait.

21 THIRTY-FIRST CONGRESS OF THE INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION at Copenhagen. *Dr. d'auteur,* 22:90. *See August 26, 1907.*

June, 1909.

23 PERSIA. Electoral law signed.

26 BULGARIA. Convention signed with the Oriental Railways Company whereby £84,000 will be paid in settlement of all the direct claims of the Company in Bulgaria. With regard to the right of exploitation, the Company will receive from Turkey £860,000 as stipulated in the convention between the Company and Turkey. The latter sum will be paid by Turkey out of the £1,680,000 which the Bulgarian government through Russia gave to Turkey. When the Company has settled definitely this question with Turkey the the former will give a letter of discharge to Bulgaria. From July 15 onwards Bulgaria will introduce for the Southern Bulgaria Railway lines the same tariff as is in force on the Bulgarian lines. *Times*, June 30.

29 FIFTH BRITISH NATIONAL PEACE CONGRESS at Cardiff. *Advocate of Peace*, 71:189.

29 FRANCE—SPAIN. Telegraphic convention signed at Paris. Ratifications exchanged at Paris, July 29, 1909. Takes effect August 1, 1909. *J. O.*, July 31.

29 PERU—UNITED STATES. Ratifications exchanged at Washington of arbitration convention signed at Washington, December 5, 1908; ratification advised by the Senate, December 10, 1908; ratified by the President, March 1, 1909; ratified by Peru, May 3, 1909; proclaimed by the President, June 30, 1909. *U. S. Treaty ser.*, No. 528.

29 RUSSIA signed at London the Declaration of February 26, 1909, respecting rules for a naval prize court. The declaration has been signed by all the powers represented in the London Naval Conference.

29 RUSSO-FINNISH COMMISSION, the object of which is to delimit Imperial from Finnish local legislation, held its first sitting at St. Petersburg. Adjourned until September. *Times*, July 1.

July, 1909.

1 NORWAY. New tariff becomes operative.

3 PERSIA. Russian circular note to the powers on the situation in Persia. Explains necessity for advance of Russian troops to Kazvin (86 miles from Teheran). This action was caused by danger to foreigners in Teheran, from the impending seizure of that city by the Bakhtiari. *Times*, July 5.

July, 1909.

6 PRUSSIA—SWEDEN. Opening of ferry service between Sassnitz and Trelleborg. *Times*, July 7, 8. *See March 7, 1908.*

8 EIGHTH INTERNATIONAL TUBERCULOSIS CONFERENCE opened at Stockholm. *Times*, July 9.

9 GERMANY—GREAT BRITAIN. Exchange of notes renewing for a further period of one year the arbitration agreement signed July 12, 1904. *Treaty ser.*, 1909, No. 20.

9 BOLIVIA—PERU. Judgment in the boundary arbitration pronounced by the President of the Argentine Republic. According to the award the boundary line will follow the rivers Heath and Madre de Dios up to the mouth of the Toromonas and from there a straight line as far as the intersection of the river Tehuamanu with meridian 60°. It will then run northward along this meridian, until it meets the territorial sovereignty of another nation. *Times*, July 13.

10 INTERNATIONAL AERONAUTICAL EXHIBITION opened at Frankfort. *Times*, July 10. Remains open until October 10.

13 CRETE. A memorandum from the four protecting powers to Turkey in answer to the latter's note on the Cretan question announces the intention of the powers to withdraw their garrisons on July 26 and to station four warships in Cretan waters in order to protect the Moslem islanders and safeguard the supreme rights of the Ottoman Empire. The powers expressly describe the present arrangement as provisional and reserve to themselves the right to discuss the regularization of the political status of the island at a more opportune moment. *Times*, July 14. *See June 20, 1909.*

13 CRETE. The consuls-general of the four protecting powers declare on behalf of their governments in a communication to the Executive committee:

(1) That, continuing the execution of the measures laid down in principle in their collective note of July 23, 1906, and precisely defined by the note addressed to M. Zaimis on May 11, 1908, they will carry out the complete withdrawal of their troops on the 26th inst., confident in the wisdom of the Cretan people and relying on the energy and loyalty of the authorities constituted for the maintenance of public order and the security of the Mussulman population.

July, 1909.

(2) That they will continue to take a benevolent interest in the Cretan question but they consider it indispensable not to leave any one in ignorance of the fact that it is their duty to watch over the maintenance of order and the safety of Mussulmans in Crete, reserving to themselves to that end the right of taking such steps as they may consider necessary for reestablishing order should disturbances arise and the local authorities find themselves unable to suppress them. *Times,* July 14.

13 PERSIA. National forces enter Teheran. *Times,* July 14.

13 PERSIA. Russia hands Turkey a note pointing out that the advance of Turkish troops in Western Azerbaijan was contrary not only to the spirit of the Anglo-Russian agreement whereby the British and Russian governments undertook to preserve the integrity of Persia, but also to the assurances given to these governments by the Porte at the time of the Turco-Persian frontier dispute. The note concluded with a request that the Porte should check any further advance of the troops.

14 GERMANY—UNITED STATES. Ratifications exchanged at Washington of agreement signed at Washington February 23, 1909, to effect a more operative reciprocal protection of patents, working patterns, designs and models. *Reichs-G.,* 1909, No. 47. Ratification advised by the Senate, April 15, 1909; ratified by the President, April 20, 1909; ratified by Germany, June 15, 1909; proclaimed by the President, August 1, 1909. *U. S. Treaty ser.,* No. 521.

14 FRANCE—UNITED STATES. French law approving extradition convention signed at Paris January 6, 1909. *J. O.,* July 15.

16 FRANCE—MEXICO. French law approving convention signed at Mexico, June 3, 1908. Validity of marriages celebrated before diplomatic and consular agents. *J. O.,* July 18.

16 PERSIA. At a meeting of the National Committee, the Shah Mahomed Ali was formally deposed and his son Sultan Ahmed Mirza was unanimously chosen Shah, under the regency of Azad-ul-Mulk, pending convocation of parliament. The deposed Shah had earlier in the day sought sanctuary in the Russian legation. *Times* July 17, 21. Mahomed Ali Shah, born June 21, 1872, succeeded his father, Muzzaffar-ed-dîn, January 8, 1907.

18 TWELFTH INTERNATIONAL CONGRESS AGAINST ALCOHOLISM, at London. *Times,* July 19. *See July 29, 1908.*

July, 1909.

18 Morocco—Spain. Moors attacked Spanish lines, which extended from the Atalayon promontory towards Mount Gurugu. *Times*, July 31, 27. The trouble originated in murder of four workmen employed on the railway near Melilla.

20 International Congress of Nurses at London. *Times*, June 5.

20 Canada—France. French law approving commercial convention signed at Paris, September 19, 1907, and the supplementary convention signed at Paris, January 23, 1909. *J. O.*, July 24. *See September 19, 1907.* The supplementary convention admits Canadian cattle at the minimum rate of duty, but excludes such animals when fattened and in condition for slaughter.

20 Costa Rica—United States. Ratifications exchanged at Washington of arbitration convention signed at Washington, January 13, 1909; ratification advised by the Senate, January 20, 1909; ratified by the President, March 1, 1909; ratified by Costa Rica, June 28, 1909; proclaimed by the President July 21, 1909. *U. S. Treaty ser.*, No. 530.

21 France—Germany. French law authorizing ratification of telegraphic convention signed at Lisbon, June 2, 1908. *J. O.*, July 31.

21 France. Law approving regulations signed by the international telegraphic conference at Lisbon, June 11, 1908. *J. O.*, July 31. These regulations were signed by representatives in behalf of Germany, Argentine Republic, Australia, Austria, Hungary, Bosnia-Herzegovina, Belgium, Brazil, Bulgaria, Cape of Good Hope, Ceylon, Chili, Portuguese colonies, Crete, Denmark, Egypt, Erythea, Spain, France, Great Britain, Greece, British Indies, Dutch Indies, French Indo-China, Iceland, Italy, Japan, Luxemburg, Madagascar, Montenegro, Natal, Norway, New Caledonia, New Zealand, Orange River Colony, Netherlands, Persia, Portugal, Roumania, Russia, Senegal, Servia, Siam, Sweden, Switzerland, Transvaal, Tunis, Turkey and Uruguay. *See June 11, 1908.*

23 Peru—United States. Ratifications exchanged at Lima of naturalization convention signed at Lima, October 15, 1907; ratification advised by the Senate, February 19, 1908; ratified by the President, March 9, 1908; ratified by Peru, July 23, 1909; proclaimed, September 2, 1909. *U. S. Treaty ser.*, No. 532.

26 Mexico. Adhesion to arrangement signed at Madrid April, 1891, respecting international registration of trade marks. *J. O.*, July 11.

July, 1909.

26 CRETE. France, Great Britain, Italy and Russia evacuate Crete. *Times,* July 27.

29 FRANCE—GREAT BRITAIN. Ratifications exchanged at Paris of the additional extradition convention signed at Paris, October 17, 1908. *J. O.,* July 31. French law approving July 14. *J. O.,* July 15.

30 PARAGUAY—UNITED STATES. Ratification by United States Senate of arbitration convention signed at Asuncion March 13, 1909.

HENRY G. CROCKER.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES [1]

American historical association, Annual report of the, 1907. 2 vols. Cloth, 75c. per vol. (Vol. 2 contains diplomatic correspondence of the Republic of Texas, pt. 1.)

Continental congress, Journals of the, 1774–89. v. 13, 14, 15. *Library of Congress.* Price, cloth, $1.00 per vol.

Dominican Republic, Extradition treaty between the United States and the, signed at Santo Domingo June 19, 1909. 8 p. *Dept. of state.* (Confidential S. ex. doc. C.)

Federal and state constitutions, colonial charters and other organic laws of states, territories and colonies; by Francis Newton Thorpe. 1909. 7 vols. Price, cloth, $5.25.

Foreign relations of the United States, Papers relating to the, 1906. 2 pts. *Dept. of state.* Cloth, pt. 1, $1.00; pt. 2, 90c.

German manufactures furnished by the German government to the United States, Correspondence between the Dept. of State and the German government having relation to. 1909. *Dept. of state.* (S. doc. 99.) Paper, 5c.

Hague conference, 1907, Instructions to the American delegates to the. 12 p. *Dept. of state.*

Hague conference. Letter [to the representatives of the United States accredited to the governments signatories to the acts of the Hague conference, 1899.] October 21, 1904. 9 p. *Dept. of state.*

Hague peace conference, Proposal for calling the. 1906. (Confidential.) 3 p. *Dept. of state.*

Immigration laws and regulations of July 1, 1907. 6th ed. 1909. 86 p. *Bureau of immigration and naturalization.* Price, paper, 10c.

Information for immigrants. 1909. 26 p. *Bureau of immigration and naturalization.*

International anti-alcohol congress. Statement as to the representation of the United States to the. 1909. 2 p. (H. doc. 30.)

[1] When prices are given, the document in question may be obtained for the amount mentioned from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Judge-advocates general of the army, Digest of opinions of the. Rev. ed. *War dept.* Sheep, $1.50.

Maritime warfare, The laws and usages of. The second peace conference (paragraph 3 of programme.) Working memoranda by Brigadier-General George B. Davis and Rear-Admiral Charles S. Sperry. (Confidential for the United States delegates.) 1907. 60 p. *Dept. of state.*

Pan-American conference to be held at Buenos Aires, Argentina, May, 1910, Tentative programme for the 4th. 36 p. *Bureau of American republics.*

Pan-American scientific congress, Report of the delegates of the United States to the, held at Santiago, Chile, 1908–9. 65 p. (S. doc. 64.) Paper, 20c.

Paraguay, Arbitration convention between the United States and, signed at Asuncion, March 13, 1909. 3 p. *Dept. of state.* (Confidential S. ex. doc. B.)

Reduction of armaments. [Letter from the Italian ambassador to the Secretary of State, April 5, 1907.] 2 p. *Dept. of state.*

Second Hague peace conference. [Correspondence, 1906.] 3 p. *Dept. of state.*

Second Hague peace conference, Correspondence concerning a. (Confidential.) 1907. 36 p. *Dept. of state.*

Second Hague peace conference. Note verbale from the Russian ambassador to the Secretary of State. March 22, April 4, 1907. 3 p. *Dept. of state.*

Supreme Court of the United States, List of works relating to the. 1909. 124 p. *Library of Congress.* Price, paper, 20c.

Union for the protection of industrial property, Letters from the acting Secretary of State and the Commissioner of Patents recommending appropriation to defray expenses of the conference of the international. 1909. 4 p. *Dept. of state.* (S. doc. 136.)

Venezuela, Protocol of agreement between the United States and, for the decision and adjustment of claims. Signed at Caracas, February 13, 1909. 13 p. *Dept. of state.*

War on land, The rules of. The second peace conference (paragraph 2 of programme.) Working memoranda by Brigadier-General George B. Davis. (Confidential for the United States delegates.) 1907. 68 p. *Dept. of state.*

GREAT BRITAIN [2]

Austria and Hungary, Accession of, to the industrial property convention, 1883, etc., January 1, 1909. *Foreign office.* (cd. 4649.) ½d.

Congo State, Further correspondence respecting the taxation of natives and other questions in the. *Foreign office.* (cd. 4701.) 1½d.

Cuba, Accession of, to the convention signed at Genoa, 6th July, 1906, for the amelioration of the condition of the wounded and sick in armies in the field. *Foreign office.* (cd. 4698.) ½d.

Egypt, Accessions of British colonies, etc., to the commercial convention between the United Kingdom and, signed at Cairo, 29th October, 1889. *Foreign office.* (cd. 4700.) ½d.

Egypt and the Soudan, Reports by H. M. agent and consul-general on the finances, administration and condition of, in 1908. *Foreign office.* (cd. 4580.) 8½d.

Germany, Exchange of notes between the United Kingdom and, confirming protocols defining boundaries between British and German territories in Africa. 22nd February, 5th March, 1909. *Foreign office.* (cd. 4699. ½d.

Hayti, Abrogation of the convention between the United Kingdom and, of 6th April, 1906, respecting nationality. 1st April, 1909. *Foreign office.* (cd. 4644.) ½d.

Mexico, Accession of, to the declaration respecting maritime law signed at Paris, April 16, 1856. February 13, 1909. *Foreign office.* (cd. 4582.) ½d.

Opium question in China, Despatch from H. M. Minister in China forwarding a general report by Sir Alexander Hosie respecting the. *Foreign office.* (cd. 4702.) 2½d.

Persia, Correspondence respecting the affairs of. [1906–1908.] *Foreign office.* (cd. 4581.) 1s. 11d.

Servia, Accession of British colonies, etc., to the treaty of commerce between the United Kingdom and, signed at Belgrade, February 17, 1907. *Foreign office.* (cd. 4648.) ½d.

Siam, Despatch from H. M. minister in Siam forwarding a treaty between Great Britain and, signed at Bangkok, 10th March, 1909. *Foreign office.* (cd. 4646.) 7½d.

Transvaal, Convention, dated 1st April, 1909, between the Governor

[2] Official publications of Great Britain, India and many of the British colonies may be purchased of P. S. King & Son, Orchard House, 2 and 4 Great Smith Street, Westminster, London, England.

of the, and the Portuguese province of Mozambique. *Colonial office.* (cd. 4587.) 1½d.

United States of America, Denunciation of the agreement of November 19, 1907, between the United Kingdom and the, respecting commercial travellers' samples and import duties on British works of art. May 1, 1909. *Foreign office.* (cd. 4645.) ½d.

LIBERIA

Arbitration award *in re* the case Fischer and Lemcke vs. Houston Bros. and Co. Monrovia, 1907. 30 p.

Consular regulations of the Republic of Liberia. Monrovia, 1906. 8 p. *Dept. of state.*

Liberian Development Co., An agreement entered into by the government of the Republic of Liberia and the, chartered and limited January 5, 1906, together with a joint resolution of the Legislature ratifying the same. Monrovia. 12 p.

Memorandum from H. B. M.'s government on the subject of reforms in Liberia. January 14th, 1908. *Dept. of state.*

Message of the President of Liberia communicated to the second session of the thirty-first Legislature. Monrovia, 1908. 34 p.

Propositions submitted by the Ellsworth Company and the Americo Liberian Industrial Company to the government of Liberia. Monrovia. 1908. 25 p. Price, 10c.

Treaties and conventions concluded between the Republic of Liberia and foreign powers, 1848–1892. Monrovia, 1907. 64 p. *Dept. of state.*

Tripartite agreement between the government of Liberia, Messrs. Emile Erlanger & Co., and The Liberian Development Company Chartered and Ltd. Monrovia, 1908. 31 p. Price, 25c.

NETHERLANDS

Deuxième conférence internationale de la paix. La Haye, 15 juin-18 octobre 1907. Actes et documents. Tome 1–3. *Ministère des affaires étrangères.*

VENEZUELA

El libro amarillo de los Estados Unidos de Venezuela presentado al Congreso nacional en sus sesiones de 1909 por el cuidadano Ministro de relaciones exteriores. xxxviii., 895 p. *Ministerio de relaciones exteriores.*

Mensaje que el General Juan Vicente Gomez, Presidente de la republica presenta al Congreso nacional en 1909. Caracas. 42 p.

PHILIP DE WITT PHAIR.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN BANANA COMPANY V. UNITED FRUIT COMPANY

Supreme Court of the United States

April 26, 1909

Mr. Justice HOLMES. This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. *July 2, 1890, c. 647, § 7, 26 Stat. 209, 210.* The Circuit Court dismissed the complaint upon motion, as not setting forth a cause of action. *160 Fed. Rep. 184.* This judgment was affirmed by the Circuit Court of Appeals, *166 Fed. Rep. 261,* and the case then was brought to this court by writ of error.

The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded

to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the plantation and railway. In August one Astua, by *ex parte* proceedings, got a judgment from a Costa Rica court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendant then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employees and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that even if the main argument fails and the defendant is held not to be answerable for acts depending on the cooperation of the government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the Act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See *The Hamilton, 197 U. S. 398, 403; Hart* v. *Gumpach, L. R. 4 P. C. 439, 463, 464; British South Africa Co.* v. *Companhia de Mocambique, (1893) A. C. 602.* They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. *Rev. Stat., § 5335.* See further, *Commonwealth* v. *Macloon, 101 Mass. 1; The Sussex Peerage, 11 Cl. & Fin. 85, 146.* And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *Rex* v. *Sawyer, 2 C. & K. 101; The Zollverei, Swabey, 96, 98.* But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater* v. *Mexican National R. R. Co., 194 U. S. 120, 126.* This principle was carried to an extreme in *Milliken* v. *Pratt, 125 Mass. 374.* For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillipa* v. *Eyre, L. R. 4 Q. B. 225, 239, L. R. 6 Q. B. 1, 28; Dicey, Conflict of Laws, 2d ed. 647.* See also Appendix, *724, 726, Note 2, ibid.*

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always

within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." *Ex parte Blain, In re Sawers, 12 Ch. Div. 522, 528; State* v. *Carter, 27 N. J. (3 Dutcher) 499; People* v. *Merrill, 2 Parker, Crim. Rep. 590, 596.* Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed.

For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. *Underhill* v. *Hernandez, 168 U. S. 250.* The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact. The fact has been recognized by the United States, and by the implications of the bill is assented to by Panama.

The fundamental reason why persuading a sovereign power to do this or that can not be a tort is not that the sovereign can not be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a non-conductor and to bar responsibility, *Allen* v. *Flood, (1898) A. C. 1, 121, 151,* etc., but it is not clear that this is always true, for instance, in the case of the privileged repetition of a slander, *Elmer* v. *Fessenden,*

151 Mass. 359, 362, 363; or the malicious and unjustified persuasion to discharge from employment. *Moran* v. *Dunphy, 177 Mass. 485, 487.* The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts can not, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law. See *Kawananakoa* v. *Polyblank, 205 U. S. 349, 353.* In the case of private persons it consistently may assert the freedom of the immediate parties to an injury and yet declare that certain persuasions addressed to them are wrong. See *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U. S. 1, 16–21; Fletcher* v. *Peck, 6 Cranch, 87, 130, 131.*

The plaintiff relied a good deal on *Rafael* v. *Verelst, 2 Wm. Bl. 983 Ibid. 1055.* But in that case, although the Nabob who imprisoned the plaintiff was called a sovereign for certain purposes, he was found to be the mere tool of the defendant, an English Governor. That hardly could be listened to concerning a really independent state. But of course it is not alleged that Costa Rica stands in that relation to the United Fruit Company.

The acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government and must be taken to have been done by its order. It ratified them, at all events, and adopted and keeps the possession taken by them. *O'Reilly de Camara* v. *Brooke, 209 U. S. 45, 52; The Paquete Habana, 189 U. S. 453, 465; Dempsey* v. *Chambers, 154 Mass. 330, 332.* The injuries to the plantation and supplies seem to have been the direct effect of the acts of the Costa Rican government, which is holding them under an adverse claim of right. The claim for them must fall with the claim for being deprived of the use and profits of the place. As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the Act of Congress and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Further reasons might be given why this complaint should not be upheld, but we have said enough to dispose of it and to indicate our general point of view.

Judgment affirmed.

IN THE MATTER OF LETTERS ROGATORY

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California

April 7 and 9, 1909

The following letter was received by the Circuit Judge from the Consul General of Mexico:

SAN FRANCISCO, CAL.,
April 7th, 1909.

SIR:

My Government, through its Embassy, has directed me to present for your action, and I have the honor herewith to enclose letters rogatory, that you may grant the request contained therein. To that effect I have had a literal translation made of said letters rogatory, which I also beg to enclose herewith.

In brief, the request consists in having one Carlos Schuetz, a student at the University of California, at Berkeley, summoned before you and have his deposition taken as to his knowledge regarding the murder of one David E. Evans, by one Frank Stanley, in the District of Mocorito, State of Sinaloa, Republic of Mexico.

Should your honor be pleased to act upon the premises when returning the document to this Consulate General of Mexico, I pray that you mention what amount I shall remit to cover all costs, fees, and other legal expenses that may be connected with the proceedings, that I may have the honor to meet them duly.

With very great respect,
(Signed) P. ORNELAS.

HON. W. W. MORROW,
Judge of the United States Circuit Court,
City.

To which the Circuit Judge replied as follows:

SAN FRANCISCO, CAL.,
April 9th, 1909.

MY DEAR SIR:

I am in receipt of your communication of the 7th instant enclosing letters rogatory to take the testimony of one Carlos Schuetz, a student of the University of California at Berkeley, summoned to have his deposition taken as to his

knowledge regarding the murder of one David E. Evans by one Frank Stanley in the district of Mocorito, state of Sinaloa, Republic of Mexico.

As at present advised I do not think I have authority to direct the Commissioner to require the attendance of a witness to give his deposition in a criminal case.

Section 4071 of the Revised Statutes of the United States provides for the taking of testimony to be used in foreign countries "*in any suit for the recovery of money or property.*" It has been held that this act is confined to the taking of testimony to be used "in a suit of recovery of money or property" pending in a court of a foreign country and does not apply to a criminal case. *In the matter of the petition of the Spanish Consul at New York. 1 Ben. 225.*

Section 875 of the Revised Statutes provides among other things that "when letters rogatory are addressed from any court of a foreign country to any Circuit Court of the United States, a commissioner of such Circuit Court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in the courts." This section does not extend the cases in which examination of witnesses will be ordered. *In re Letters Rogatory from First District Judge of Vera Cruz, 36 Fed. 306.*

Furthermore, Article 6 of the Amendments to the Constitution of the United States provides that: "In all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him." Testimony obtained by letters rogatory in foreign countries would not therefore be admitted in evidence against the accused in a criminal case in this country, and it would seem to follow that the courts of the United States would not authorize the taking of a deposition to be used in a criminal case in a foreign country unless such authority was expressly conferred by a statute.

In *Moore's International Law Digest, volume 2, page 111*, there is reported a case where the Minister of Germany presented through the Secretary of State at Washington to the Governor of Pennsylvania letters rogatory issued by the royal Prussian court at Konitz for the purpose of securing the testimony of Theresia Saydack to be used in the criminal prosecution of Michael Zimmel. In reply to this application the Attorney General of Pennsylvania advised the Governor of that state under date of June 30, 1893, that the statute of that state did not contemplate the taking of evidence by letters rogatory in criminal cases to be used in a foreign country. The Attorney General says:

"It seems, therefore, that the statute of 1833, to which reference has been made, is extended to the case of letters rogatory from a foreign tribunal, and that in such cases the courts of common pleas in Pennsylvania will receive them in civil cases and enforce them according to their own prescribed methods of procedure and by their proper and usual processes. It nowhere appears, however, that this statute contemplated the taking of evidence in this way for criminal cases, nor under the direction and by the process of our courts of quarter sessions and oyer and terminer, organized for criminal jurisdiction. The taking of testimony by deposition for criminal cases is unknown to our system of jurisprudence, and section 9 of Article I of the Declaration of Rights in our Consti-

tution provides that in all criminal prosecutions the accused hath the right to meet the witnesses face to face."

This letter was transmitted to the Secretary of State of the United States by Governor Pattison, and was communicated by the Secretary of State to Dr. Von Holleben, German Ambassador at Washington.

This action of our Department of State in this case indicates that it approved the opinion of the Attorney General of Pennsylvania in the case mentioned, and while such action is not binding upon the courts it is of persuasive force. I am, therefore, of the opinion that it is not competent for a court of the United States to direct a United States Commissioner to take the testimony of witnesses by letters rogatory where the testimony is to be used in a criminal case in a foreign country.

If, however, you are of the opinion that I am in error in this view of the law, I would be pleased to hear from you further upon the subject.

I herewith return the documents enclosed in your letter.

Very truly yours,

(Signed) WM. W. MORROW,
U. S. Circuit Judge.

DOCTOR PLUTARCO ORNELAS,
Consul General of the Republic of Mexico,
San Francisco, California.

THE CASE OF THE SCHOONER "BETSEY"[1]

Court of Claims of the United State

March 29, 1909

PEELLE, *Ch. J.*, delivered the opinion of the court:

On May 20, 1800, the schooner *Betsey*, Francis Bulkley, master, was captured on her homeward voyage from St. Vincent by a French privateer and the vessel and cargo were condemned as good prize by the French prize court sitting at Basse Terre, in the island of Guadeloupe, June 22, 1800. The illegality of the condemnation is rightly conceded by the defendants.

The vessel and cargo were sold under the decree and became a total loss to the owners, John Morgan and Francis Bulkley. Some ten months thereafter, in March, 1801, the vessel appeared in the port of New York under the name *Belen*, owned by a Spaniard, who sold the vessel to one George Barnewell, an American citizen; but Barnewell not having been one of the original owners of the vessel at the time of her condemnation was precluded by law, and particularly by Revised Statutes, section 4165, from procuring an American register. To accomplish that end Barne-

[1] This is one of the cases coming under the head of "French spoliations."

well on March 21, 1801, purported to sell by a bill of sale the vessel for the consideration of $3,000 (which was not paid) to John Morgan, one of the former owners thereof, who, on April 1, 1801, procured a register in his own name and in that of his former associate owner. Francis Bulkley, under the original name of the schooner *Betsey*. Within one week thereafter Morgan resold the vessel to George Barnewell, who appears to have paid to Morgan, in addition to the cost of the register, the sum of $250, which sum was paid by Morgan to the underwriters on said vessel, but to which underwriters does not appear. After the resale of the vessel Barnewell on April 8, 1801, procured a register in his own name.

The defendants' contention is (1) that the case comes within the ruling of the court in the case of the brig *Hiram*, Humphrey (23 C. Cls., 431, 441); (2) that the transfer of the vessel by Barnewell to Morgan was simply to enable Morgan to procure, for the benefit of Barnewell, a register, and that for that reason the transactions were in violation of law and a fraud upon the United States.

Respecting the first contention, the brig *Hiram* is not controlling, as in that case the vessel was bought in by the master for the benefit of the owners, and though the amount paid therefor was trifling it was held to measure the extent of the liability of France.

In the present case it is not shown that the vessel was bought in by the owners or by any one for them, or that any benefit therefrom accrued to them by reason of the condemnation and sale other than the $250 paid by Barnewell to Morgan for securing the register, which sum appears to have been paid to the underwriters, doubtless for the reason that upon the payment of the insurance on the vessel the owners assigned their interest therein to the insurance company, who thereby became subrogated to their rights.

The second ground of defense is based on the fraud of Morgan and Barnewell in procuring the register, and that having perpetrated the fraud Morgan is estopped from now asserting that the vessel was not repurchased for the benefit of the owners, or at least of himself. If the affidavit of Morgan upon which the register was issued was false, the United States had the right of election to declare the ship or its value forfeited, *United States* v. *Grundy, 3 Cranch. 338, 351; The Venus, 8 Cranch. 253, 276; Six Hundred Tons of Iron Ore, 9 F. R. 595*, but that would not have affected the liability of France which had accrued long prior thereto.

Under the act of our jurisdiction citizens of the United States who, prior to the ratification of the treaty with France concluded September 30, 1800, had valid claims on the French government for indemnity growing out of her illegal acts, are given the right to prosecute the same on the theory that when the government relinquished the claims of her citizens to France in consideration of the relinquishment by France of her national claim against the United States, she thereby took from her citizens private property for public use, for which just compensation should be made. That being so, the government, in respect to these claims, stands in the right of France, so that whatever defense France had or could have interposed against such claims at the time of condemnation is available to the United States. *The ship Joanna, 24 C. Cls. 198.*

The case is to be determined as one between the citizen and the French government "according to the rules of law, municipal and international, and the treaties of the United States applicable to the same," as provided in the act of our jurisdiction.

As before stated, the defendants invoke the doctrine of estoppel. Estoppel is a rule of evidence, and was early stated by Lord Denman in the case of *Pickard* v. *Sears, 6 A. & E. 469:* "Where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the time." See also the case of *Snare & Triest Co., 43 C. Cls. 364, 367.*

It certainly can not be contended that the position of the United States respecting a claim against France was changed by reason of the acts of Morgan and Barnewell in procuring the register, as the rights of Morgan were fixed by the treaty between the United States and France at the date thereof, to wit, September 30, 1800, while the fraud of Morgan in procuring the register was not until April 1, 1801, or six months thereafter. Certainly France could not have interposed this defense, as it is not one which existed at the time the vessel was condemned and sold; and not being a defense which would have been available to France at the time, it can not now be asserted by the United States, in whose right they defend and whose liability they assume under the act of our jurisdiction.

The issue being one between a citizen of the United States and France, he is entitled to have his rights adjudicated on the theory of the illegality of the acts of France in capturing, condemning, and selling his vessel.

His subsequent violation of a law of the United States, for which the United States had their remedy, can not be interposed to defeat the claim against France for her unlawful acts. This being true, the doctrine of estoppel can have no application to the liability of France.

The presumption may fairly be indulged that the vessel and cargo under the decree of condemnation were sold and became a total loss to the owners. This view is strengthened by reason of the ownership of the vessel by the Spaniard and the change of the name of the vessel to *Belen*. The Spaniard sold the vessel to Barnewell, who was not one of her former owners, and for that reason he could not procure a register. There is nothing to rebut the presumption of good faith in this sale. But Barnewell, to enable him to procure a register under said section 4165, sold the vessel to John Morgan, one of her former owners. Hence, whatever fraud was perpetrated was by Barnewell, the bona fide owner of the vessel, through Morgan, one of her former owners; and while Morgan permitted himself to be a party to the fraud he was paid $250, which went to the underwriters doubtless as subrogees.

Furthermore, we think it may fairly be presumed that the vessel, when sold under the decree, was purchased by the Spaniard on his own account, as the contrary is not shown; and the subsequent circumstances justify that presumption.

For these reasons the claimants are entitled to an allowance for the value of the vessel as well as for the cargo and freight earnings, the adventure owned by the master and the premiums of insurance paid, except as to the premium of insurance on $2,000 effected by Morgan on his own interest in the vessel the day after she was captured, which is not recoverable against the United States, *Schr. John Eason, 37 C. Cls. 443, 447; Sloop Townsend, 42 C. Cls. 140, 145; Schr. Two Cousins, 42 C. Cls. 436, 440.*

The defendants make practically the same defense in this case they did in the case of *The Mercury*, Gilpatrick, wherein the court filed findings in May, 1908, refusing to make any allowance. But in that case the owners, while procuring the reregistration of the vessel, failed to show from whom or by what means they repossessed themselves of the vessel or whether any one other than themselves had ever had any interest therein, the burden of which was upon them. In the absence, therefore, of any showing as to how the owners became possessed of the vessel after the condemnation we applied the ruling in the case of the brig *Hiram*, Humphrey, supra; but as in *The Mercury* the amount of the repurchase

did not appear, nor the value, character, nor ownership of the cargo, no allowance was made.

The findings herein, together with this opinion, will be certified to Congress.

TOEG v. SUFFERT

U. S. Circuit Court of Appeals, Ninth Circuit

February 1, 1909

Appeal from the United States Court for China.

GILBERT, *Circuit Judge.* The appellants in this case seek to review by appeal a judgment of the United States Court for China rendered in an action at law which they brought against the appellee to recover upon a promissory note. *Section 3, Act June 30, 1906, c. 3934, 34 Stat. 815 (U. S. Comp. St. Supp. 1907, p. 798)*, creating a United States court for China provides:

> That appeals shall lie from all final judgments or decrees of said court to the United States Circuit Court of Appeals of the Ninth Judicial Circuit, and thence appeals and writs of error may be taken from the judgments or decrees of the said Circuit Court of Appeals to the Supreme Court of the United States in the same class of cases as those in which appeals and writs of error are permitted to judgments of said Court of Appeals in cases coming from District and Circuit Courts of the United States. Said appeals or writs or error shall be regulated by the procedure governing appeals within the United States from the District Courts to the Circuit Court of Appeals, and from the Circuit Court of Appeals to the Supreme Court of the United States, respectively, so far as the same shall be applicable; and said courts are hereby empowered to hear and determine appeals and writs of error so taken.

It is apparent from a reading of this section that it was the intention of Congress to recognize the distinction between cases at law and cases in equity and admiralty, and to provide that the mode of procedure by which the appellate jurisdiction of this court may be invoked shall conform in all respects to the statutes and rules of court governing appeals and writs of error from the district and circuit courts. The statute is not unlike the statute which was construed in *Chase* v. *United States, 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 284.* The case could have been brought to this court only upon writ of error. For want of jurisdiction we are required to dismiss the appeal, notwithstanding that the appellee has made no motion nor appearance herein. *Jones* v. *La Valette, 5 Wall. 579, 18 L. Ed. 550; Generes* v. *Campbell, 11 Wall. 193, 20 L. Ed.*

110; Bevins et al. v. Ramsay et al., 11 How. 185, 13 L. Ed. 657; Behn Meyer and Co. v. Campbell and Go Tauco, 200 U. S. 611, 26 Sup. Ct. 753, 50 L. Ed. 619.

The appeal is dismissed.

MAIORANO V. THE BALTIMORE AND OHIO RAILROAD CO.

Supreme Court of the United States

April 5, 1909

Mr. Justice MOODY delivered the opinion of the court.

The husband of the plaintiff in error was killed while a passenger on a train by the negligence of the defendant. The death occurred within the state of Pennsylvania, and this action was brought in a court of that state to recover damages for it. The plaintiff was a resident of Italy, and a subject of the king of Italy. By the statutory law of the state of Pennsylvania, *Act of April 15, 1851. P. L. 669, pars. 18 and 19,* as amended by the *Act of April 26, 1855, P. L. 309, par. 1,* the right to recover damages for death occasioned by unlawful violence or negligence is in certain cases conferred upon the husband, wife, children or parents of the person killed. By its literal terms the benefits of the statute are extended to all such surviving relatives, irrespective of their condition. It has, however, been held by the Supreme Court of Pennsylvania, in the case of *Deni* v. *Pennsylvania R. R. Co., 181 Pa. 525,* as well as in the case at bar, that this statute does not give to relatives of the deceased, who are non-resident aliens, the right of action therein provided for. There is nothing in this case to take it out of the general rule that the construction of a state statute by the highest court of the state must be accepted by this court. It is, herefore, not material that similar statutes have been differently construed, as for instance, in *Mulhall* v. *Fallon, 176 Mass. 266,* and *Kellyville Coal Co.* v. *Petraytis, 195 Ill. 217.*

The plaintiff rests her right to recover not upon this statute alone, but upon certain provisions of a treaty between the United States and the king of Italy, ratifications of which were exchanged on November 18, 1871. *17 Stat. 845.* She asesrts that the effect of the treaty was to confer upon the plaintiff the same right to recover damages for the death of her husband that she would have enjoyed by the statute of the state of Pennsylvania if she had been a resident and citizen of that state. The contention of the plaintiff in this respect was denied by the trial court, which granted a judgment of nonsuit, which was affirmed by the supreme

court of the state, and is now here on writ of error. The only question for our decision is whether a proper interpretation and effect were allowed to the treaty.

We do not deem it necessary to consider the constitutional limits of the treaty-making power. A treaty, within those limits, by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights. *Ware* v. *Hylton, 3 Dall. 199; United States* v. *Schooner Peggy, 1 Cr. 103, 110; Foster* v. *Neilson, 2 Pet. 253, 314; Hauenstein* v. *Lynham, 100 U. S. 483;* per Mr. Justice Miller, in *Head-money Cases, 112 U. S. 580, 598,* quoted with approval by Mr. Chief Justice Fuller in *In re Cooper, 143 U. S. 472, 501; United States* v. *Rauscher, 119 U. S. 407, 418; Geofroy* v. *Riggs, 133 U. S. 258.*

We put our decision upon the words of the treaty. By a fair interpretation of them, did they directly confer upon the plaintiff the right which she seeks to maintain? We are of the opinion that they did not.

Three articles only are relied on as material. They are:

ARTICLE 2.

The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

ARTICLE 3.

The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

ARTICLE 23.

The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and, likewise, at the taking of all examinations and evidences which may be exhibited in the said trials.

Article 23 bestows upon citizens of either power, whether resident or non-resident, free access to the courts, "in order to maintain and defend their own rights," with the ancillary privileges of suitors. This article does not define substantive rights, but leaves them to be ascertained by the law governing the courts and administered and enforced in them.

Articles 2 and 3 deal with the rights of the citizens of one party sojourning in the territory of the other. There seems to be nothing pertinent to the case in article 2. But special stress is laid upon article 3, which stipulates for the citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property. It can not be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for caring for his safety is removed, the chance of his death by unlawful violence or negligence is increased, and thereby the protection and security of his person are materially diminished. The conclusion is drawn that a full compliance with the treaty demands that, for his protection and security, this action by his surviving relatives should lie. The argument is not without force. Doubtless one reason which has induced legislators to give to surviving relatives an action for death has been the hope that care for life would be stimulated. This thought was dwelt upon in *Mulhall* v. *Fallon, supra,* in considering a statute which made the amount recoverable dependent upon the degree of culpability of the negligent person. Another reason for such legislation, quite as potent, was the desire to secure compensation to those who might be supposed to suffer directly and materially by the death. This thought seems to have been uppermost in Pennsylvania, according to the courts of that state. See *Chambers* v. *B. & O. R. R. Co., 207 U. S. 142,* and cases cited. Without dwelling further upon the purpose and effect of legislation of this kind, and assuming that both might be calculated in some degree to increase the protection and security of persons who may be exposed to dangers, we are of opinion that the protection and security thus afforded are so indirect and remote that the

contracting powers can not fairly be thought to have had them in contemplation.

If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection, and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.

Judgment affirmed.

JURAGUA IRON COMPANY, LIMITED, v. THE UNITED STATES

Supreme Court of the United States

February 23, 1909

Mr. Justice HARLAN delivered the opinion of the court.

This action was brought in the Court of Claims to recover from the United States the alleged value of certain property destroyed in Cuba, during the war with Spain, by order of the officer who at the time of its destruction commanded the troops of the United States operating in the locality of the property.

The case depends altogether upon the facts found by the court. We can not go beyond those facts.

The Court of Claims found that the Juragua Iron Company (Limited) was a corporation of Pennsylvania, having its principal office and place of business in Philadelphia and was and for many years had been engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba and alsewhere and in manufacturing iron and steel products; that it was so engaged at the opening of the late war with Spain; and to enable it to carry on business it owned, leased and operated mines in Cuba, maintaining offices, works and the necessary tools, machinery, equipments and supplies for its business in the Province of Santiago de Cuba, at or near Siboney, Firmeza and La Crux; that in addition to its mines, works and their equipments, the company also owned real estate at or near Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business and occupied by its employees as dwellings and for other purposes;

that in the year 1898, and "while the war with Spain was in progress, the lives of the United States troops who were engaged in military operations in the province of Santiago de Cuba, in the belligerent prosecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs;" that on or about the 11th of July, 1898, General Miles, commanding the United States forces in Cuba, because of the necessity aforesaid and by the advice of his medical staff, issued orders to destroy by fire these 66 buildings at Siboney, which belonged to the claimant and had been used for the purposes aforesaid; that pursuant to that order such buildings and their contents were destroyed by fire by the military authorities of the United States; that the reasonable value of the buildings at the time and place of destruction was $23,130, and the reasonable value of the drills, furniture, tools and other personal property so destroyed by fire was seven thousand nine hundred and eighty-six dollars ($7,986), making a total of thirty-one thousand one hundred and sixteen dollars ($31,116).

As a conclusion of law the court found that the United States was not liable to pay any sum to the plaintiff on account of the damage aforesaid and dismissed the petition.

It is to be observed at the outset that no fact was found that impeached the good faith, either of General Miles or of his medical staff, when the former, by the advice of the latter, ordered the destruction of the property in question; nor any fact from which it could be inferred that such an order was not necessary in order to guard the troops against the dangers of yellow fever. It is therefore to be assumed that the health, efficiency and safety of the troops required that to be done which was done. Under these circumstances was the United States under any legal obligation to make good the loss sustained by the owner of the property destroyed?

By the act of March 3d, 1887, *24 Stat. 505, c. 359*, providing for the bringing of suits against the government of the United States the Court of Claims was given jurisdiction to hear and determine all claims

> founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department or upon any contract, expressed or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort.

in respect to which claims the party would be entitled to redress against the United States, either in a court of equity or admiralty if the United States were suable.

Manifestly, no action can be maintained under this statute unless the United States became bound by *implied* contract to compensate the plaintiff for the value of the property destroyed, or unless the case — regarding it as an action to recover damages — be one "*not* sounding in *tort*."

The plaintiff contends that the destruction of the property by order of the military commander representing the authority and power of the United States was such a taking of private property for public use as to imply a constitutional obligation, on the part of the government, to make compensation to the owner. *Const. Amend. V.* In support of that view it refers to *United States* v. *Great Falls Mfg. Co., 112 U. S. 645, 656; Same* v. *Same, 124 U. S. 581, 597–8; United States* v. *Lynah, 188 U. S. 445.* Let us examine those cases.

United States v. *Great Falls Mfg. Co., 112 U. S. 645, 656,* was a case of the taking for public use by agents and officers of the United States proceeding under the authority of an act of congress of certain private property — lands, water rights and privileges — which were held and used by the government for nearly twenty years, without any compensation being made to the owner. A suit was brought against the United States in the Court of Claims, and judgment was rendered for the claimant. This court said:

It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution — upon which question we express no opinion — there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States, 91 U. S. 367, 374.* In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the

Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded "upon any contract, express or implied, with the Government of the United States."

In reference to the subsequent case of *Great Falls Mfg. Co.* v. *Attorney-General, 124 U. S. 581, 597*, it may be said that so far as it has any bearing upon the present controversy it reaffirms the principle announced in *United States* v. *Great Falls Mfg. Co., 112 U. S. 645, 656*. The court said:

It is sufficient to say that the record discloses nothing showing that he [the Secretary of War] has taken more land than was reasonably necessary for the purposes described in the act of congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the act of congress, whether it is embraced or described in said survey or map, or not. * * * Even if the Secretary's survey and map, and the publication of the Attorney-General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes, indicated in the act under which its officers have proceeded.

In *United States* v. *Lynah, 188 U. S. 445, 464–5*, which involved the inquiry whether the injury done to certain lands as the result of work done on the Savannah River by the United States was a taking of private property for public use, the court said:

The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. * * * So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the fifth amendment guarantees that when this governmental right of appropriation — this asserted paramount right — is exercised it shall be attended by compensation. * * * Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.

It is clear that these cases lend no support to the proposition that an implied *contract* arose on the part of the United States to make com-

pensation for the property destroyed by order of General Miles. The cases cited arose in a time of peace and in each it was claimed that there was within the meaning of the Constitution an actual taking of property for the use of the United States, and that the taking was by authority of congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country? We say "enemy's country" because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.

In *Miller* v. *United States, 11 Wall. 268. 305,* the court, speaking of the powers possessed by a nation at war, said:

It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is the right, and why is it allowed? It may be remarked remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality.

In *Lamar's Ex'or* v. *Brown, 92 U. S. 187, 194,* the court said:

For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies.

"All property within enemy territory," said the court in *Young* v. *United States, 97 U. S. 39, 60,* "is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and if it be hostile property, subject to capture." Referring to the rules of war between independent nations as recognized on both sides in the late Civil War, the court, in *United States* v. *Pacific Railroad Co., 120 U. S. 227, 233, 239,* said:

> The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. * * * The inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown* v. *Hiatts, 14 Wall. 177, 184.* * * * More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well-settled doctrines of public law it was not responsible for them. * * * The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than a strict legal right."

See also *The Venus, 8 Cranch, 253, 278; The Venice, 2 Wall. 258, 275; The Cheshire, 3 Wall. 233; The Gray Jacket, 5 Wall. 345, 369; The Friendschaft, 4 Wheat. 105, 107; Griswold* v. *Waddington, 16 Johns. 438, 446–7; Vattel, b. 3, c.,* § *70.* and *c. 4,* § *8; Burlamaqui, Pt. 4, c. 4.* § *20.*

So in Hall's *International Law, 5th ed. 500, 504, 533:*

> A person though not a resident in a country may be so associated with it through having, or being a partner in, a house of trade there, as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory.

In Whiting's *War Powers Under the Constitution, 340, 342,* the author says:

> A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character of a merchant, so far as relates to his property engaged in

trade, is determined by his commercial domicile. "All such persons * * * are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory." * * * A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.

In view of these principles — if there were no other reason — the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. If the property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How then under the facts found could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which at the time and in reference to the property in question had a commercial domicil in the enemy's country? It is true that the army, under General Miles, was under a duty to observe the rules governing the conduct of independent nations when engaged in war — a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity to those rules — as upon the facts found we must assume that it was — then the owner of the property has no claim of any kind for compensation or damages; for, in such a case the commanding general had as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes. In the circumstances disclosed by the record it can not reasonably be said that there was, in respect of the destruction of the property in question, any "convention between the parties," any "coming together of minds," or any circumstances from which a *contract* could be implied. *Russell* v. *United States, 182 U. S. 516, 530; Harley* v. *United States, 198 U. S. 229, 234.* Again, if, as contended — without, however, any basis for the contention — the acts of that officer were not justified by the laws of war, then the utmost that could be said would be that what was done pursuant to his order amounted to a tort, and a claim against the government for compensa-

tion on account thereof would make a case "sounding in tort." But of such a case the court would, of course, have no jurisdiction under the act of congress.

In this connection we may refer to *Hijo* v. *United States, 194 U. S. 315, 322,* in which the United States was sued by a Spanish corporation for the value of the use of a merchant vessel taken by the United States in the port of Porto Rico, when that city was captured by our army and navy on July 28th, 1898, and kept and used by the Quartermaster's Department for some time thereafter. The court said:

> There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for the purposes of war, and not for any purposes of gain.

After observing that the case did not come within the principle announced in *United States* v. *Great Falls Mfg. Co., 112 U. S. 645, 656,* the court proceeded:

> The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort, because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. * * * If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract, because of the retention and use of the vessel pending negotiations for a treaty of peace.

In our judgment there is no element of contract in the claim of the plaintiff. And even if it were conceded that its property was wrongfully and unnecessarily destroyed under the order of the general commanding the United States troops, the concession could mean nothing more, in any aspect of the case, than that a tort was committed by that officer in the interest of the United States. But, as already said, of a cause of action arising from such a tort the Court of Claims could not take cognizance, whatever other redress was open to the plaintiff.

It may be well to notice one other matter referred to in argument.

Section 1066 of the Revised Statutes, *12 Stat. 767, c. 92, § 9*, provided that the jurisdiction of the Court of Claims

> shall not extend to any claim against the Government not pending therein on December 1st, 1862, growing out of or dependent on treaty stipulations entered into with foreign nations or with the Indian tribes.

We need not now consider or definitely determine whether that section was superseded or modified by the above act of March 3d, 1887; for, if it was, and if an implied contract could in any case arise from a treaty stipulation, there is nothing in any treaty with Spain which stood in the way of the destruction of the buildings in question under the circumstances stated in the findings without liability on the part of the United States for their value; and if that section was not superseded or modified then the law is for the United States, because of the absence of any implied contract entitling the plaintiff, under the facts found, to be compensated for the loss sustained by it.

Having noticed all the questions that require consideration and finding no error in the record, the judgment of the Court of Claims must be affirmed.

It is so ordered.

BOLIVIA–PERU: ARBITRAL AWARD IN BOUNDARY DISPUTE

Rendered by the President of the Argentine Republic

July 9, 1909

JOSE FIGUEROA ALCORTA, *President of the Argentine Nation.* Inasmuch as the government of the Argentine Republic has been named arbitrator to settle the boundary question existing between the republics of Bolivia and Peru in accordance with the arbitration treaty celebrated in the city of La Paz, on the thirtieth day of the month of December in the year one thousand nine hundred and two,[1] and exchanged in the same city on the ninth day of the month of March one thousand nine hundred and four.

Animated by the desire to respond to the confidence reposed in this government by both republics so intimately bound to Argentina by origin, tradition, and destiny, I appointed an advisory commission composed of Dr. Antonio Bermejo, President of the Supreme Court of Justice of

[1] See SUPPLEMENT, p. 383.

the nation, Ex-Minister of Justice and Public Instruction, and ex-Plenipotentiary at the International American Conference at Mexico; Dr. Manuel Augusto Montes de Oca, Ex-Minister for Foreign Affairs and Ex-Counsel of the Argentine Government in the arbitration with the Republic of Chile; Dr. Carlos Rodriguez Larreta, Ex-Minister for Foreign Affairs, Ex-Plenipotentiary at the Second Peace Conference, and a member of the Permanent Court of Arbitration of The Hague; and Dr. Horacio Beccar Varela to act as Secretary. This commission was to fix the rules of procedure to be followed in giving the award, receive the expositions, allegations and proofs of the high contracting parties, and advise the arbitrator in the solution of the question of boundaries submitted to his decision.

With the result that, this commission having exchanged views with the ministers representing Peru and Bolivia fixed rules of procedure to be observed, and in conformity with these rules, the respective expositions, replies, proofs and objections have been presented, which have been carefully studied by the Commission.

That, according to the defence of Bolivia the boundary line ought to run:

> Beginning at the south, from the River Suches, the line crosses the lake of the same name lengthwise, and ascends the mountains by the Palomani-tranca and the Palomani-cunca to the peak of the same name, which is the highest of the snow mountains of that region. It descends by the eastern slope by the boundary marks of Yaguayagua, Huajra, and Lurirni, which mark the possessions of the two republics. It continues to the boundary mark of Hichocorpa in the range of that name and descends by the River Corimayo to the River San Juan del Oro or Tambopata, and by the course of this river, down stream to its junction with the Lanza. From this point it turns to the mouth of the Chunchusmayo on the River Inambari, and follows this down stream to its junction with the Marcapata. It ascends by this to the boundary of the ancient province of Paucartambo and by these boundaries to the place known in colonial times as Opatari, at the junction of the Rivers Tono and Piñipiñi. Following along the boundaries of the province of Urubamba and by the River Yanatile it comes to the River Urubamba, whose stream it follows to the point of meeting with the Ucayali, whence it continues to the slopes of the Yavary by the right bank of that river.[2]

That the defence of the Republic of Peru is summed up in the following terms:

> Within these limits the claim of Peru proceeds to describe the districts of Charcas and of the vice-royalty of Lima in the following form:

[2] Allegation of Bolivia, p. 313.

(1) The Audiencia of Charcas of the vice-royalty of Buenos Aires in 1810 extended, in so far as the present case is concerned from the spot where the Peruvian-Bolivian boundary ends, in accordance with the treaty of September 23, 1902, by the central line of the stream of the Tambopata and of the Tuiche, as far as the headwaters of the Madidi; it followed the course of this river until it flowed into the Beni, and continued to the east until it met the River Exaltacion or Yruayani, whose course, and that of the river Mamore as far as the mouth of Guapore or Itenes were the termination of the boundary line.

(2) The territory to the north and northeast of this line up to the frontier of Portugal belonged to the vice-royalty of Peru in 1810.[3]

Taking into consideration that:

In accordance with Article 1 of the arbitration treaty,

The high contracting parties submit to the judgment and decision of the government of the Argentine Republic as arbitrator, and judge, the boundary question pending between the two republics in order to obtain a definite and unappealable decision, according to which all the territory which in 1810 was included within the jurisdiction or district of the ancient Audiencia of Charcas within the limits of the vice-royalty of Buenos Aires, through the acts of the former sovereign, should belong to the republic of Bolivia, and all the territory that on the same date, and from the same source was a part of the vice-royalty of Lima, should belong to the republic of Peru.

Whereas in interpreting the article relative to the jurisdiction of the arbitrator, in exercise of the faculty recognized by international law (Convention for the pacific settlement of international conflicts, sanctioned at the conferences of the Hague in 1899 and 1907, article 48 of the First and 73 of the Second; Calvo: Le Droit International, III, 1757) it should be understood the high contracting parties have qualified it to fix the dividing line between the Audiencia of Charcas and the vice-royalty of Lima in 1810, in so far as it refers to their respective territorial rights, since if the entire boundaries of both of these colonial divisions had to be determined, the rights of various nations who had no part in the arbitration agreement of 1902, on which the present decision is based, would be affected. To which is added the provision in article 9 of the treaty, according to which, when the decision shall have been made and the envoys extraordinary and ministers plenipotentiaries of the high contracting parties notified, "The territorial delimitation of right between the two republics shall be considered definitely and obligatorially fixed" which expresses clearly that it is the territorial delimitation between these which the arbitrator is called upon to settle.

[3] Exposition of the Republic of Peru, vol. I, p. 3, and vol. II, p. 259.

Whereas: In conformity with Article 2 of the arbitration treaty, modified in accordance with the terms of the act of exchange of ratifications, dated at La Paz, the ninth day of the month of March one thousand nine hundred and four, the arbitrator is given a fixed and expressly stated point of departure for settling the boundary line, viz: "The place at which the actual frontier line coincides with the River Suches," as stated in the following terms of the arbitration treaty complemented by the act of exchange referred to above:

ARTICLE 2. The delimitation and marking of the frontier which begins between the Peruvian provinces of Tacna and Arica, and the Bolivian Province of Carangas (east), as far as the place at which the actual frontier lines coincide with the River Suches having been settled by the treaty of September 23,[4] of the present year, this section is excepted from the present treaty.

That: Having studied with the greatest attention the titles of both parties, the arbitrator does not find sufficient grounds for considering as the boundary between the Audiencia of Charcas and the vice-royalty of Lima in 1810, either of the demarcations supported by the respective advocates of the interested states.

That in reality the zone in dispute was in 1810, and until a recent date, completely unexplored, as appears from the various maps of colonial and later times presented by both sides, and this is recognized by themselves, which explains the fact that the boundaries of these districts ruled by the same sovereign, had not been fully determined. The defence of Bolivia recognizes this when, referring to the successive changes in the boundaries of the chief colonial districts it says that,

in this long process which has lasted more than three centuries, one frequently finds that the dispositions of the Spanish Crown have been contradictory, some of them vague, and many of them not in agreement with the situation or topographical accidents of the places. This latter is due to lack of geographical knowledge and therefore a fair interpretation in regard to the ideas relative to the period is necessary in order to appreciate the true significance and character of these dispositions.

It should be added, however, that for the Audiencia of Charcas the royal orders and dispositions were more precise.[5]

On the other hand the defence of Peru, beginning the study of those principles on which is based the demarcation of Audiencias, states, "The eastern territories, which form the subject of this arbitration, unknown,

[4] See SUPPLEMENT, p. 381.

[5] Allegation of the Government of Bolivia, p. 2.

and never conquered during colonial times, can not be included nor are included in the district of any lesser audiencia;" [6] adding further on "the proper and honest course consists in presenting the titles of the territories in dispute considered as a whole 'uti universitas,' and presenting documents which will allow the arbitrator to make a judicial demarcation or one geographically wise." [7]

That the line claimed by Bolivia, following the course of the rivers Corimayo, San Juan del Oro or Tambopata, Inambari, Yanatile, Urubamba, and Ucayali, as far as the sources of the Yavari, had been indicated previously in a straight line, which starting from the same sources of the Yavari extended to the junction of the river Inambari and the River Madre de Dios,[8] while Peru who draws the boundary line by the rivers Madidi, Yruyani, and Marmore, previously fixed them by the rivers Tequeje and Beni, following these up to their junction with the Marmore.[9]

That these differences are easily explained if one takes into account that, as the arbitration treaty of December 30, 1902, had foreseen, and as is shown in the notable arguments presented by both sides before the advisory Commission, the royal acts or dispositions in force in 1810 did not define in a clear manner the ownership of the territory in dispute, in so far as to determine whether it were within the jurisdiction of the vice-royalty of Lima or that of the Audiencia of Charcas, which were colonial districts under the same sovereign as these territories, and until 1776 the second was an integral part of the first.

To recognize this fact it is sufficient to observe that the laws of the "Recopilacion de Indias" indicated in the first place as a factor in the decision of article 3, of the arbitration treaty, bounded the Audiencia of Charcas "on the north by the Royal Audiencia of Lima and undiscovered provinces, on the south by the Audiencia of Chile, and on the east and west by the two seas of the north and south and the boundary line between the crowns of the kingdoms of Castille and Portugal, on the side of the province of Santa Cruz of Brazil" and on that of Lima; "on the north by the royal Audiencia of Quinto; on the south by that of La Plata,

[6] Exposition of the Republic of Peru, I, p. 77.

[7] Memorandum of observations and objections, presented by Peru, p. 104.

[8] Notes of May 5, 1894, and October 23, 1902, in the appendix to the reply of Bolivia, pp. 26 and 28; Polar Gomez protocol, May 21, 1897.

[9] Note of Peruvian legation, dated La Paz, November 10, 1902, in the appendix to the reply of Bolivia, p. 40.

on the west by the Southern Sea and on the east by undiscovered provinces" (Laws 5 and 9, Chapter 15, Book II).

Moreover no document of a decisive character has been shown which marks out these undiscovered provinces, which bound on the north the Audiencia of Charcas and on the east the Audiencia of Lima, and which extends them, as claimed by Peru, from the Maranon to the northern frontier of Paraguay, including the river bed of the Madre de Dios,[10] nor on the other hand as Bolivia affirms, that they follow along the banks of that river, when it is stated "the only vagueness about the boundaries is that of the undiscovered provinces. But there is not a single word in all these boundary laws which alludes otherwise to these actual or virtual districts. It is true that between the Audiencia of New Granada and Quito on the south, and of Lima on the east, and that of Charcas on the north is a portion or zone of land denominated as undiscovered provinces, but according to all probability these provinces ran the length of the banks of the Maranon and do not enter within the boundaries of the audiencias referred to.[11]

That the same occurs in regard to the bounding of the Audiencia of Charcas by the Northern Sea, and the boundary line between the crowns of the kings of Castille and Portugal, and the inclusion within it of the province of Chunchos, according to the said laws of the "Recopilacion de Indias" because even, putting aside the principles of the boundaries in force in 1810, it would have been modified by the laws of the "Recopilacion de Indias" in accordance with the ordinances of the Intendentes of 1782 and 1803. It is sufficient to observe that at the date on which this was promulgated, the Audiencia of Charcase might have been bounded by the Northern Sea, while in the region of Para to the east of the line of Tordesillas, as well as in the province of Rio de la Plata, included within its district, and in regard to the Province of Chunchos, since known as Misiones de Apolobamba, nothing authorizes us to admit that it should include all the extension of the concession, which under the name of New Andalusia was granted to Alvarez Maldonado in 1567 and 1568, and even less that it should extend to the north as far as the line of the treaty of San Ildefonso of 1777, which united the sources of the Yavary with a point equidistant from the junction of the river Madera with the Marmore and the Maranon.

That under these circumstances a strict application has been made of

[10] Argument of Peru, p. 102.

[11] Reply of Bolivia to the Peruvian allegation, p. 130.

the case provided for in article 4 of the arbitration treaty, according to which:

> **Provided that the royal acts and dispositions do not clearly define the limits of a territory, the arbitrator shall decide the question fairly in a manner as nearly as possible approaching the signification of these acts and in the spirit in which they were made.**

That, study and mature consideration has been made not only of the meaning but of the spirit of the laws of the "Recopilacion de Indias," letters patent, royal orders, ordinances of the Intendentes, diplomatic acts relating to the delimitation of frontiers, maps, official descriptions, and other documents brought forward by the high contracting parties, and especially laws 1, 5, and 9, of Chapter 15, Book II of the Recopilacion de Indias relating to the general demarcation of audiencias and in particular those of Charcas and Lima, Law 3, Chapter 7, Book I of the same recopilacion on the demarcation of bishopries, the royal letters patent of August 26, 1573, and February 8, 1590, relative to the concession made to Juan Alvarez Maldonado, the royal letter patent of February 1, 1796, which separated the Intendencia of Puño from the vice-royalty of Buenos Aires, adding it to the vice-royalty of Lima; the negotiations in regard to the celebration and execution of the boundary treaties of 1750 and 1777 between the crowns of Spain and Portugal; the ordinances of the Intendentes of January 28, 1782, and September 23, 1803, the documents on one side relating to the extension of the Misiones of Carabaya in the district of the river San Juan de Oro or Tambopata, and on the other side relating to the Misiones of Apolobamba and of Mojos, in the region of the river Toromonas.

That in accordance with the preceding conditions I am obliged to decide this question fairly, approaching in the decision the signification of the royal dispositions presented by the respective parties and to the spirit of the same.

Wherefore in accordance with the counsels of the advisory commission, I hereby declare that the frontier line now in dispute between the republics of Bolivia and Peru, be settled in the following manner:

Starting from the point where the actual frontier coincides with the river Suches, the line of territorial demarcation between the two republics, shall cross the lake of the same name, up to the ridge of Palomani-Grande, whence it shall continue to the lakes of YaguaYagua, and by the river of that name shall come to the river San Juan de Oro or Tambopata. It shall continue by the stream of this river Tambopata,

down stream, until it meets the river Lanza or Mososhuaico. From the junction of the rivers Tambopata and Lanza a line shall go to the eastern head of the river Abuyama or Heath, and shall follow this down stream until it flows into the river Amarumayu or Madre de Dios. By the thalweg of the river Madre de Dios the line shall descend as far as the mouth of the Toromanos, which flows into it on its right bank. From the junction of the Toromanos and Madre de Dios, it shall follow a straight line to the point where the river Tahamanu intersects the degree of longitude 69 west of Greenwich, and following this meridian the bound shall extend to the north as far as the spot where it meets the boundary of another nation, which is not a party to the arbitration treaty of December 30, 1902.

The territory situated to east and south of the line fixed shall belong to the republic of Bolivia, and the territory situated to the west and north of the same line, shall belong to the republic of Peru.

Let this award be communicated to the envoys extraordinary and ministers plenipotentiary of the high contracting parties, and copies of the same furnished them in accordance with article 9 of the arbitration treaty.

Done in triplicate, sealed with the great seal of the arms of the republic and countersigned by the minister secretary of the Department of Foreign Affairs and Worship, in the Palace of the National Government, in the city of Buenos Aires, capital of the Argentine Republic, on the ninth day of the month of July in the year one thousand nine hundred and nine.

[Signed] J. Figueroa Alcorta.
[Signed] V. de la Plaza.

BOOK REVIEWS

The United States as a World Power. By Archibald Cary Coolidge. New York: The Macmillan Co. 1909. pp. vi, 373. $2.00 *net.*

The ten years, which have elapsed since the United States acquired the Philippines and entered the field of colonial expansion, have been productive of numerous books dealing with the new problem, which this departure from the traditional American policy has imposed upon the people of the United States. Many of these books have been interesting; few of them, of real value; and most of them, mere channels for the expression of opinions or the exploitation of theories, more or less fantastic or ill-conceived. In the treatment of recent history of such importance to the national welfare impartiality by American writers is difficult. A man can hardly be expected to watch from day to day the progress of events without forming opinions so strong as to affect his judgment as to facts. The events lack perspective; every thing is in the foreground; large and small happenings assume false proportions with resulting distorted conclusions. Imagination, sentiment, partisanship, and material interest affect the vision. This is very normal and to be expected. None the less it destroys the value of most that has been written about American affairs, national and international, during the past decade. It is, therefore, most agreeable to the student of present-day history to find a work upon this subject, which neither reeks with "manifest destiny," "Anglo-Saxon domination," or "duty to humanity," nor dooms to unutterable woe the republic which has abandoned "the traditions of the fathers" in its pursuit of power and wealth. Such a work is "The United States as a World Power" by Professor Archibald Cary Coolidge of Harvard University. From the first to the last of its 373 pages there is a fairness of treatment that not only commends the book to the reader, but before he has finished it excites his admiration. The author holds no plea for any party or faction; he has no cherished theory to propound; his opinions are conservative, and his advancement of them guarded. Neither Imperialist nor Anti-Imperialist can complain of the treatment of their arguments, but on the other hand neither will find much for special congratulation. Probably the origin of the

book is the chief reason for its freedom from bias. The writer in the preface explains that it was originally prepared in the form of lectures, which were delivered during the winter of 1906–07 at the Sorbonne, as the Harvard lectures on the Hyde foundation. Written for a French audience the method of presenting the various topics is more conservative than if the lecturer's hearers had been American students versed in the early history of the United States, imbued with American ideals, and desirous of looking into the future rather than at the past.

It may seem to some, who read the book, that the first four chapters, entitled "Formation and growth," "Nationality and immigration," "Race questions," and "Ideals and shibboleths," might have been omitted. The probable explanation is to be found in the composition of the original audience of the writer. In rewriting his lectures for publication it certainly would not have lessened their value to have condensed these chapters, although on account of subsequent references to them they could not have been omitted.

The order, in which the subjects are considered, also shows the influence of the fact that the lectures were for French ears. France is given undue prominence in American foreign affairs, an entirely artificial arrangement adopted for a special occasion.

The book deals with the great international problems which the United States is called upon to face at the present time. The title seems to have been given because of its attractive sound to American readers, rather than because of its relation to the general subject. "World power" tickles the American ear, and it is apt to be read with complacency if not with pride. In spite of the author's definition he shows that the term is vague, or as he says, "not scientifically exact." One feels a little regret that a more appropriate title could not have been found.

The introduction is made necessary by the title of the book rather than by the book itself. In it Professor Coolidge reviews historically the dominance of various states in the affairs of Europe from the fifteenth century to the present time calling particular attention to the "wild scramble for land" by the European powers during the last quarter of the nineteenth century and the surprise of the United States when it found itself accepting "the role of a power holding distant colonies." A "world power" is then defined at some length, which briefly stated is a nation possessing sufficient physical might to be "an arbiter of mankind;" and the powers thus qualified are given as five and ranked as follows: Great Britain, Russia, France, the United States, and Germany.

Whether this list is or is not correct makes no difference so far as the book is concerned.

The four chapters which follow the introduction are introductory in character, as has already been said, and are not essential in their entirety to a comprehensive view of the international questions which at the present time command the attention of the United States, nevertheless the subjects with which they deal are interesting and their presentation is attractive.

Of the succeeding fifteen chapters five possess especial interest as containing the principal problems in the present foreign relations of the United States. They are chapter V, the Monroe Doctrine; chapter VIII, the Philippine question; chapter XV, the Isthmian Canal; chapter XVI, the United States and Latin America; and chapter XVIII, the United States and China. Perhaps it would be well to add to these chapter IX, economic considerations, as necessary to a full understanding of chapters VIII, XVI, and XVIII.

In the chapter on the Monroe Doctrine the author discusses its origin, the expansion of the primary form of the principle to that which it has assumed at the present time, its dependence upon physical rather than moral force for vitality, and the responsibilities which its assertion entails. The historical portion is concise and comprehensive, the analyses are clear, and the deductions appeal to the reader as sound. The discussions are enlivened, as are other portions of the book, with some very pertinent any very perplexing questions, which emphasize the difficulties to be met by those who are charged with the solution of these problems.

In the chapter on the Philippine question both sides of the question are fairly presented, as are the three doctrines as to the proper course for the United States to pursue now that it has come into possession of the islands. The Taft policy, which is summed up in the phrase, "the Philippines for the Filipinos," is naturally given the greater space as representing the attitude of the past and present administrations. The author tells us that it seems to have received the support of American public opinion, "if in a blind way;" and he adds:

> By its novelty it is in keeping with the American scorn for precedents, and the belief that the United States can accomplish things impossible to other countries; by its high ideals it appeals to the best side of the American character; but for its triumph it demands long-continued unselfishness.

In the chapter, which follows, entitled "economic considerations," the author brings out another feature of the Taft policy, the advocacy of

free trade between the islands and the United States, which would be of special benefit to the Filipino; and he points out the weakening influence of such a plan upon the policy of the "open door," which originating in England was given its chief impulse by Secretary Hay. The inconsistencies, which it must be admitted are to be found in the history of the foreign relations of the United States under changed conditions and different administrations, are not concealed by Professor Coolidge; and, while he states the excuses which have been made and the attempts to reconcile these inconsistencies, he gives the impression that the United States has changed sides as self-interest has shifted. Americans do not relish the charge of hypocrisy made by foreign governments, but they will subject themselves to it until they come to a clearer comprehension than they have to-day of what is for the ultimate good of the nation and adopt a policy that will be more stable than the present.

The chapter on the Isthmian Canal and Latin America are satisfying. The one on Latin America is especially well done. The author has brought out the complex character of the problems arising from the relations of the United States and the republics to the south. He shows that the peoples are temperamentally uncongenial, although sympathetic in their political ideals; that the Latin Americans are distrustful and jealous of the United States; that every act of the American government is presumed by them to be induced by selfish motives; and that this suspicious and envious attitude of Latin America makes the conduct of intercourse with those states always delicate and frequently exasperating. A very excellent resumé of the growth and present status of Pan-Americanism is given, although hardly enough is said of the impetus which it received during the secretaryship of Mr. Root, who did more than any other American secretary of state to remove the fears of Latin Americans as to the aims of the United States and to impress upon them the honesty of our friendship. Not until Mr. Root's time could it be said that the United States had a definite and consistent Latin American policy.

American relations with China are divided by Professor Coolidge into two parts, Americans in China and Chinese in America. Both are discussed briefly and interestingly. Perhaps there is a tendency to overestimate the "disinterested aid and protection" given the great empire by the United States, but as the statements are usually based on a comparison with the acts of other foreign governments they hardly deserve criticism.

The remaining chapters dealing with the relations with other countries are entertaining and instructive, particularly the last chapter of the book, which is devoted to Japan. Some portions of these chapters, however, could well be condensed.

The book leaves with the reader some strong impressions. The United States seems to be depicted as a boy, who has grown beyond his years, who possesses the vigor of manhood but lacks the poise and experience of age, while with the enthusiasm and rashness of youth he attempts difficulties that would cause older and wiser men to hesitate. The Spanish war looms large as an epoch-making event in American history. It is the pivot on which international policies and principles have swung about. It has turned the thoughts and ambitions of the American people into new channels, placed before them new ideals, and excited their imagination as to the future field of their country's greatness. One feels in reading the book that, while altruism and humanitarianism have been constantly invoked by the United States, in the back-ground lies the real force in directing international affairs — self-interest. This is not done hypocritically but honestly. It is a species of self-delusion natural to a people whose moral standard is high and whose ideals are noble.

Above all a reader is impressed by the gravity of the international questions which American statesmen must consider and determine, for in their determination, whether right or wrong, lie the destinies of the republic.

ROBERT LANSING.

The Romance of American Expansion. By H. Addington Bruce. New York: Moffat, Yard and Co. 1909. pp. 245. $1.75 net.

This book aims to present the story of American expansion in a popular form and does not go beyond printed and readily accessible material for its source. It is not intended for scholars and it will not profit them to read it; but the general reader will find it both interesting and instructing. The best method of depicting an irresistible movement on the part of a people is not by biographical sketches. If not one of the characters of whom Mr. Bruce gives an account had lived the expansion of the United States would have proceeded on substantially the same lines which it has followed. Mr. Bruce has, however, subordinated individuals to the events which controlled them and the result is surprisingly good.

In reality, his book is an example of better biographical method than of historical method.

Long before the United States bought Louisiana the pioneer emigration westward began. The emigrants were home-makers, who were bold adventurers and men of resource, and none among them was bolder nor more resourceful than Daniel Boone, who forms the subject of Mr. Bruce's first chapter. To him and the men who followed him the Mississippi River was the natural and only highway for carrying their products to market, and when Spain closed the mouth of the river it became absolutely necessary to the western country that the act be undone. Accordingly, Thomas Jefferson, as president, opened negotiations with France, to whom title to the territory surrounding the mouth of the river had passed, to acquire it. For this reason and because he had always held advanced views on the subject of the spreading destiny of America, Thomas Jefferson is the second great expansionist brought upon the stage. Mr. Bruce has accorded no agency in the acquisition of Louisiana to James Madison, but that statesman, over-modest in life, must have become accustomed by this time to neglect in history; yet it is indisputable that his instruction to John Jay in October, 1780, to press Spain for the right of free navigation of the Mississippi, and his prevention of the surrender of the river in 1787 had a considerable bearing upon the treaty of cession which Livingston and Munroe signed in 1803.

Efforts to buy the Floridas had been made at the same time with the offers which resulted in the acquisition of Louisiana, and a natural sequence of that acquisition was renewed activity to obtain the Floridas. The invasion of West Florida by Andrew Jackson undoubtedly hastened the purchase; therefore, Andrew Jackson is selected as the third typical expansionist.

The annexation of Texas was brought about, as Mr. Bruce truly says, by causes which do not connect themselves with the logical progress of previous acquisitions, for elements of conspiracy and political trickery entered into it and the sectional question of slavery played a large part. Sam Houston had as much to do with its actual accomplishment as any one else and Mr. Bruce groups his account of the annexation about him.

For the Oregon occupation he accepts Senator Thomas H. Benton as the chief factor. He has shown such a versatility of choice in the selection of his types, giving us a backwoodsman, a philosophical statesman, a general, and a conspiring adventurer, that we can not refrain from the suggestion that in dealing with Oregon he might have given us

even more variety by an account of John Jacob Astor, who founded Astoria for trading purposes and gave to the United States the foothold which lead to possession. We think, also, that in his hints for reading on the subject of the Oregon question he should not have left out reference to Von Holst's chapter on this subject in his Constitutional History of the United States, for it is full and authoritative.

Telling the story of the conquest of California through John C. Fremont, and the purchase of Alaska by William H. Seward the book closes with an account of William McKinley as the agent in adding Hawaii, Porto Rico and the Philippines to our domain, and this part is too rose-colored and undiscriminating to be called history. We miss in it any reference to the sagacity of the two consuls, Pratt at Singapore and Wildman at Hongkong, who brought Aguinaldo from his retirement and sent him on to Dewey, or any defense of Dewey's judgment in putting arms into his hands.

Mr. Bruce's style is admirable and the influence of the book upon young men who will read it must be wholesome.

GAILLARD HUNT.

Lehrbuch des internationalen Konkursrechts. By Dr. F. Meili. Zurich: Orell Füssli. 1909. pp. xvi, 292.

The book now before us may be considered as a sequel to two earlier publications by this author. The first one, evidently regarded by the author himself as the parent work, appeared in 1902 and in its English form (1905) bears the title "International Civil and Commercial Law." The second work treats of the subject of international civil procedure and appeared in 1906. Preliminary to the publication of the present work, which deals with the conflict of laws in respect of bankruptcy, the author made a detailed study of the various treaties relating to this topic, existing between various nations on the continent of Europe, the result of which was published in pamphlet form in 1908. As a further preliminary study, the author has reviewed historically the relation of various systems of law one to another in the matter of bankruptcy practice and procedure, beginning with certain isolated references in Roman authorities, continuing through the period of the commercial supremacy of the north Italian municipalities and down to the present period of the national diversification of legislation. These researches were published in 1908 as a *Festschrift* in celebration of the fiftieth anniversary of the con-

ferring of the doctor's degree upon Professor Von Bar of Göttingen who may, in a measure, be considered the successor of Savigny in the field of international private law.

The arrangement and method is uniform with the earlier works of the author. Instead of dealing with the rules of conflict recognized in only one system of law, which is the customary method of English and American writers, the author discusses successively the rules prevailing in all the principal commercial countries of the world. This has obvious advantages in broadening the point of view and in leading to comparative conclusions. It tends to advance the progress of the science by promoting a better understanding and a more tolerant attitude among jurists of different nations, in respect of the applications of law and the competency of jurisdictions. There is indeed a certain corresponding loss of thoroughness in detail, but this is of less importance in countries in which the legislature has determined in advance the scope of local and foreign law, a practice more customary on the continent of Europe than in England or America, where there are but few legislative rules of conflict.

The introduction outlines the scope of the topic and is mainly concerned with academic concepts. It undertakes to cite every provision contained in the written law of the principal commercial nations, which may be construed as an intention by the legislature to determine in advance the application of local or foreign law or jurisdiction in bankruptcy (pp. 19–24). The author does not recognize any specific rule of conflict in the United States Bankruptcy Act, except perhaps section 65d which provides that resident creditors shall first be paid a dividend equal to that received in any foreign bankruptcy court by foreign creditors, before such creditors shall be paid anything. This is a corollary to section 2 (1) which gives the United States courts jurisdiction to adjudge persons bankrupt who have been adjudged bankrupts in foreign countries and have property in the United States, irrespective of whether such persons are or are not domiciled within or citizens of the United States. It is a more extreme rule than that prevailing in other nations in that it also confers jurisdiction to adjudicate nonresidents as bankrupts without a prior foreign adjudication, so long as any property whatever is found in the United States. Even the English Act (sec. VId) requires at least a commercial domicile in England.

The American rule certainly raises questions of much difficulty and may result in hardship by compelling foreign merchants having a small amount of property but no regular establishment within the United

States to defend a petition in bankruptcy thousands of miles from their country of origin and domicile. In such proceedings it might be necessary both to appear in person and to produce all books of account and business records.

The historical part of the book (pp. 27–36) has been condensed because of the more complete treatment in the prior work. The final chapter (pp. 240–287) which relates to bankruptcy treaties in force is also less detailed in treatment for a similar reason. The treaties of France with Belgium and Switzerland create a condition approximating complete extraterritorial recognition to orders in bankruptcy within the territory of the contracting powers; those of Austro-Hungary accord extraterritoriality only so far as bankruptcy affects movable property; the treaties of Germany are more restrictive and cover minor matters without recognizing decrees issued by courts of the co-contracting state.

The question of the "ubiquity of operation of the bankrupt law," to adopt Story's phraseology, is discussed not only in its academic aspect, but also in connection with the specific legislation of the various countries. Certain French authors favor it upon the ground that bankruptcy alters the personal status, but we think the author has answered this clearly in pointing out that bankruptcy does not affect the capacity to act, but simply restricts the capacity to deal with property composing the bankrupt estate.

Curiously enough, academic discussion *pro* and *con* has lead to ambiguity in the jurisprudence of several nations. Certain decisions of the Imperial Court of Germany adopt the view that a foreign trustee in bankruptcy is entitled to possession of property of the bankrupt located in Germany, though Kohler and the present author are energetically opposed to any such deduction from the statutes (p. 111). French courts seem to vary between a policy of according *exequatur* to the foreign trustee and demanding that a new bankruptcy be instituted in France (p. 115). In Italy the question seems open as to whether the judges will consider the foreign trustee *ipso facto* empowered to deal with property in Italy, or whether the foreign adjudication must first be made executive in Italy (p. 117).

Sufficient has been indicated to show the diversity in practice. The book covers a large number of questions in which the variances are quite as marked. It would certainly seem desirable to arrive at international agreement on many of these points in order to accomplish what is indeed one of the most important objects of all bankruptcy laws, viz., the equal

distribution of insolvent estates among creditors, whether local or foreign. The author believes that the time is not yet ripe for general international treaty regulation. The material requires a more thorough preparatory consideration than has yet been given to it. It is probably for this reason that the Hague Conference of 1904 adopted simply a standard draft treaty for acceptance by any pair or group of nations the governments of which are in sufficient accord upon this topic.

ARTHUR K. KUHN.

Les États-Unis et le Droit des Gens. Considérations et notes. By Ernest Nys, Counsellor to the Court of Appeal of Brussels, Professor at the University, Member of the Permanent Court of Arbitration. Brussels: Revue de droit international et de législation comparée. 1909. pp. iii, 161.

Professor Nys was well advised to reprint his interesting and valuable notes on the United States and international law, contributed to the *Revue de Droit International et de Législation Comparée*, and to issue them in pamphlet form for general circulation. Professor Nys' mastery of international law in systematic form, as well as in its historical development, qualified him to discuss and present the contributions of any one nation to the science; his profound knowledge of the origins and growth of the United States, everywhere evident in the brochure, as well as his outspoken sympathy with the aims and purposes of our country assure an acceptance of his views and concurrence in the occasional criticism in which he indulges.

Although disclaiming the intention to enter into the details of our colonial history, and limiting himself to international as distinct from constitutional and public law, the learned author and publicist nevertheless shows a rare knowledge of and insight into the nature and workings of our national government, and the introductory pages (3–66) dealing with the discovery and settlement of America, including Canada, the various colonies and their different forms of government, the steps by which union and independence were brought about, the state of society and the education or lack of it in the colonies, the religious intolerance or tolerance of the Revolutionary period, the introduction of slavery, its growth and extent in the north as well as in the south; the status of the Indian and the causes of his disappearance, the position of the bar in the years preceding the revolution and the training and course of study pursued or required for practice are calculated to amaze the historian by

profession, to enlighten the European who wishes a rapid survey of our early constitutional growth and development, and to satisfy the needs of the American layman who may care to obtain in brief compass and in simple form the impressions of an European observer and sympathetic critic upon the colonization of the United States, the origin and growth of its institutions, and the means by which the union was created from the colonies and the nation from the government under the Articles of Confederation.

Leaving matters of more or less historical interest, Professor Nys passes in rapid review the application of laws of war in the Revolution (pp. 66–71); the inviolability of private enemy property on land and the violations of the doctrine by the various states during the Revolution; the traditional attitude of the United States to the immunity of unoffending private property of the enemy upon the high seas (pp. 72–76, 102–103, 124–125) and the influence of Professor Lieber's famous Instructions for the Armies in the Field upon the codification of the laws of land warfare attempted at the Conference of Brussels in 1874, and accomplished at the Hague Conferences of 1899, 1907 (pp. 66–67); and the learned writer also notes the importance of the naval code drafted by Captain (now Rear Admiral) Stockton when president of the Naval War College of Newport (pp. 125–126).

Perhaps the greatest single contribution of the United States to international law is the formulation of a sane and correct doctrine of neutrality. Professor Nys gives an admirable sketch of the doctrine, its growth and attendant difficulties, within the short space of fifteen pages (pp. 78–92) including an account of the high handed and utterly indefensible attitude of Great Britain in the matter of visit and search. A couple of pages are devoted to the troubles with the Barbary states and the banishment of licensed piracy from the Mediterranean (pp. 92–94). A more elaborate treatment is given of the American law of conquest and military occupation, and the conflict between theory and practice in the exercise of the rights of conquest and administration of occupied territory (pp. 92–101). This is followed by an account of the American claim to the free navigation of the Mississippi and the special subject is considered in connection with the European negotiations leading to the opening of the Scheldt and the influence real or indirect of Linguet's *Considérations sur l'ouverture de l'Escaut* upon American publicists charged with the settlement of the Mississippi controversy (pp. 110–112). In this same section the purchase of Louisiana is dis-

cussed (pp. 115–121). In sections XVI, XVII, Professor Nys discusses other questions in which the attitude of the United States has exercised influence: the duration of treaties, the embargoes of 1794, 1807, maritime war, the code of naval war, the Monroe Doctrine (p. 128) and the status of the Indian before and after the Revolution, closing with a brief paragraph on immigration (pp. 128–137).

Section XVIII will be of very great interest to the American reader because in this the question of Pacificism is discussed, and the passionate interest we take in the subject, as well as the contributions made for its realization, is fairly stated. The honored names of William Penn, Washington, Franklin, Noah Worcester, William Ladd, Elihu Burritt, and Charles Sumner adorn the pages, and the value of their ideals and contributions are emphasized (pp. 137–143).

The concluding chapter will be of interest to the specialist because Professor Nys enumerates American publicists and their works and supplies brief biographical notices. The readers of the JOURNAL and the members of the AMERICAN SOCIETY OF INTERNATIONAL LAW will be particularly interested in the concluding sentence where the learned and generous author refers to the "sumptuous periodical," and the very great service (*les plus grand services*) which the Society should render.

It is to be hoped that Professor Nys will find a translator for his brochure, and that translated and enlarged it may fall into the hands of students in our colleges and universities.

JAMES BROWN SCOTT.

Sulle Immunita Diplomatiche. By L. A. Tosi-Bellucci. Rome: Presso la Direzione dell' Archivio Giuridico. 1908. Price, L. 2, 50.

This pamphlet consists of a criticism and discussion of the views expressed by M. Henry Fort-Dumanoir in an article which appeared in the "Journal du Droit International privé" in the course of 1908, (vol. 35, p. 766) dealing with the question of the extent of the immunities and privileges of diplomatic officers.

The precise question which Mr. Fort-Dumanoir had proposed for discussion is as follows: "What is the condition of a diplomatic agent residing in or passing through a country other than that to which he is accredited, from the point of view of diplomatic immunity, and particularly of exemption from civil jurisdiction?"

His conclusions, based partly on theoretical considerations and partly

on certain decisions of the French courts, were in favor of the extension of the diplomatic privilege of exemption from judicial process to the diplomatic representatives of a foreign nation, even while traveling or residing in the territory of a third nation, and it is towards the invalidation of these conclusions that Mr. Tosi-Belucci directs his criticism in this little work. Nearly half its pages, however, are devoted to an exposition of what the author considers a fundamental error in his opponent's view of the question of diplomatic privilege, namely the confusion of "inviolability" which is admitted and consecrated by nearly all systems of legislation, and the "exemption from jurisdiction," which is admitted in varying degrees and treated very differently in the diverse codes or systems, and which indeed he maintains is, where it is carried to the fullest extent, rather the creation of the judge than of the lawmaker. Or to put the matter more tersely, he maintains that in the article of M. Fort-Dumanoir as in much that has been written on the subject, there is a fatal confusion between "inviolability" and "extraterritoriality," which has resulted in a wide doctrine of absolute immunity from jurisdiction under any circumstances.

The theory maintained by Mr. Tosi-Bellucci on the other hand distinguishes sharply between the public and the private activities of the diplomatic representative. The conception of inviolability must of course apply to him at all times and under all circumstances. But he is entitled to exemption from the jurisdiction of the local courts only so far as his public personalty and activity are concerned, and not at all as a private individual. Just how far this exemption should be extended would seem to be determinable rather by international courtesy and the circumstances of the case than by absolute principles of law.

With this view of the basis of jurisdictional immunity it is easy to infer the attitude of the author toward the specific question under discussion. The privileges of the diplomatic representative arise upon the presentation of his credentials to the government to which he is sent; they cease, generally speaking, upon the return of these credentials. As towards a third nation therefore, through whose territory he happens to pass, he has no official capacity out of which jurisdictional immunity can arise. As representing his government he is inviolable, but as this official personality is merely passive, except in the country to which he is accredited, it can not be supposed to give rise to any situation that calls for the solution of a jurisdictional question, and any such question must be solved by regarding him as a private individual.

As to the second case suggested, that of the diplomatic agent taking up his residence for a shorter or longer term in a country other than that to which he is accredited, it is pointed out that there are two alternatives. He does this for reasons connected with his mission and employment or on private and personal grounds. In the latter case, on the principles already laid down there is no reason for according to him any special immunity or exemption. In the former case it is rather a question of courtesy and discretion that presents itself to the authorities of the country in which he resides. This question may find its solution in the voluntary concession of all immunities necessary to enable him to perform his mission, which it must be supposed is being carried out with the tacit or express consent of these authorities.

It would doubtless be unfair in the case of such a controversial article as this to demand a complete and symmetrical presentation of the subject, but it must be said that in respect of clearness and logical compactness it contrasts rather unfavorably with the note of five or six pages which called it out. It is true that inviolability is not to be confused with extra-territoriality. The one is a practical necessity discovered early in the history of intertribal relations; the other, a fiction (once indispensable and no doubt still useful) invented to support the first mentioned doctrine and reconcile it with other principles. It is also true that in so far as jurisdictional exemption is deduced as a logical inference from the fiction, its basis is necessarily uncertain and demands scrutiny. But if, as Mr. Fort-Dumanoir apparently holds and as we take to be the fact, this jurisdictional exemption is simply a special instance or application of the practical rule designed to secure the free coming and going and exercise of his functions by a diplomatic agent, then there is at least no fallacy at the foundation, and the simple practical question presents itself, how far is this exemption from judicial process necessary for the end in view?

It is here, in fact, that the two writers differ. Mr. Fort-Dumanoir regards the exemption from local jurisdiction as an essential element of inviolability, begs the question, and presents us with a fairly complete and logical answer to the problem. Mr. Tosi-Bellucci, on the other hand, resting on the very good principle that such anomalies as extra-territoriality and jurisdictional immunity are to be confined within the narrowest possible limits, finds a purely negative solution that governments are not *obliged* by the rules of international law to grant complete and unlimited jurisdictional immunity to the diplomatic representatives of

foreign powers; but by removing the whole question to the region of discretion and international courtesy and by failing to discuss and indicate the principles on which that discretion and courtesy are to be exercised, he gives an appearance of incompleteness to his study and leaves us somewhat unsatisfied.

From a practical point of view, even though we may sympathize with his inclination to minimize the extent of exemption from local jurisdiction, we must ask how far it is worth while to press this view, seeing that certain of the remedies of the law most effectual against the individual, would evidently conflict with the doctrine of inviolability as admitted by all parties, if employed against the diplomatic functionary.

However this may be, it is worth remarking that the jurisprudence and legislation of the United States has followed lines not very different from those indicated by Mr. Tosi-Bellucci. Penalties are imposed by statute for suing out any process whereby the person of any minister, etc., is arrested or imprisoned or his goods or chattels are distrained. This restricted immunity is under the authority of *Holbrook Nelson & Co.* v. *Henderson*, 4 Sandf. 619, extended to an ambassador traveling through the territories of a state to which he is not accredited, and finally in *Byrne* v. *Herran*, 1 Daly (N. Y.) 344, the distinction was drawn in regard to the application of the Mechanics Lien Law between a building occupied for purposes connected with the representative character of the minister and one which was not so used.

JAMES BARCLAY.

Considerazioni critiche su alcune teorie del Diritto Internazionale. By Giulio Diena. Turin: Fratelli Bocca. 1908.

These "Critical reflections upon certain theories of international law," by the professor of international law in the University of Siena consist of three essays upon themes suggested by recent German work in this department.

They are essays in criticism, but it is criticism within the school, accepting its bases and fundamental theories and applying its methods. In his preliminary remarks Professor Diena states the principles and objects of this modern German school as he understands them — to substitute for the purely abstract or ideal theories of international law, which succeeded by way of reaction to the historical and positive method formerly prevailing, a series of principles which without losing sight of

actual facts should be firmly based on juridical conceptions and capable of being welded into a consistent system, independent of municipal law, but as thoroughly juridical in its nature.

Accepting these views, then, as a whole, the author here applies himself to the discussion of three principal questions: (1) the possible sources of international law; (2) the fundamental rights of the state and their relation to the fact of recognition by its neighbor states; (3) the nature of the right of the state to its own territory.

In he opening of the first paper we meet with an illustration of what Professor Diena regards as the characteristic distinction between the old and new schools. The source of international law was formerly found in the law of nature as manifested in the customary rules of intercourse between nations, in treaties, and in various other forms. The most modern jurisprudence, starting from the premise that a rule of law can acquire obligatory force only through its imposition by superior power or its voluntary acceptance, maintains that the sole original source of international law is the collective will of the group of states concerned. All other sources that have been suggested, necessity arising in consequence of interstate relations, principles having their basis in reason or in science, the juridical consciousness common to the several nations, take their place as indirect factors guiding and determining the will of the states concerned in the direction of the joint decisions which finally create the law.

This theory, as the author points out, furnishes a basis of a positive nature for the rules of international law, which are thus removed from the domain of morals, and in fact, goes far to answer the claim that these rules possess no juridical value. At the same time it leaves due room for both morality and necessity as all-powerful factors in shaping the rules themselves.

It is generally admitted that the collective will of the states concerned is manifested in at least two forms — in accepted customs and in a certain class of treaties, viz., those, the aim of which is the establishment of some general rule affecting international relations. Professor Diena would add to these the decisions of courts of arbitration, including as of the highest prospective importance the decisions of the Hague Court, and by analogy such international bodies as the Danubian Commission, in so far as they enunciate rules of law.

It has, indeed, been maintained that arbitral decisions are merely the results of previous treaties of arbitration, which are the true sources of

law in this case. On the other hand, it has been claimed that the arbitral decision is merely the enunciation of principles already existing in customary law. There is an answer to each of these contentions. The mere agreement to refer an international question to arbitration clearly creates no new law; if the rules to be applied are laid down in the treaty, it becomes in so far a source of law. Similarly, it may very well be admitted that the arbitral decision, if merely of the nature of an amicable compromise, or if consisting only in the application to the facts as ascertained of rules already clearly established, need not be regarded as a source of law. But when rules that have heretofore existed only as customs sanctioned by the practice of certain states are for the first time enunciated as general principles, they are thereby placed on an international plane and receive a new and more forceful sanction.

The remainder of this paper is devoted to a demonstration of the place of municipal law, and particularly of that one of its branches known as private international law, in relation to the sources of international law properly so called. It is pointed out that though internal law does not constitute a true source of international law, it is nevertheless the origin and spring of certain of the rules that in effect govern international relations; and it must be admitted that such rules have their place within the field of the science of international law.

The second essay deals with the question whether the recognition of a new state by its neighbors first confers international rights upon it, or whether such recognition is merely declaratory of a status already existing. The author declares for the latter theory at least so far as essential and fundamental rights, such as self preservation and independence, are concerned.

In the third paper he concludes that the state has or may have over its territory something in the nature of a real right apart from the right of "imperium" exercised over its subjects, basing his argument largely on the situation created by the occupation of leased territory by various European nations in the East, and the administration of Cyprus and Egypt by Great Britain.

The somewhat more detailed abstract given above of the first of these papers may serve, in a measure, to indicate the methods and the object of Professor Diena. These are purely critical and critical mainly of details, based on the work of others broadly accepted by the author. The very nature of this criticism forbids breadth; its logic sometimes verges on hair-splitting. None of these papers can be said to present any entirely new idea, nor any that is patently valuable.

And yet it should be recognized that taken in the large and as part of a great body of opinion and of reasoned theory that is gradually forming, such work has a high importance. The mind of the English speaking peoples does not in general tend to such methods, is apt indeed to meet them with a certain impatience. But sooner or later, the theory of the Teuton or the Latin has to be reckoned with, and begins to color results and bend the course of action over all the civilized world. It is only by the clashing and meeting of countless keen and critical intellects that the just balance of theory can be struck and the extravagances of abstract study can be curbed. We see the process at work in such studies as these.

JAMES BARCLAY.

The Hague Peace Conferences of 1899 and 1907. By James Brown Scott. Baltimore: Johns Hopkins Press. 1909. 2 vols. pp. 887, 547.

The first volume of this work consists of a series of lectures delivered, in 1908, before the Johns Hopkins University in Baltimore. The second volume contains all the documents concerning the First and Second Peace Conferences and the conventions framed by them.

Chapters 2, 3, and 4 of volume one present a record of the proceedings, discussions, and achievements of both conferences, and produce in the mind of the reader a lively impression of the actual working of the different committees. The growth of the various proposals into conventions, the process by which other proposals were wrecked, the part played by compromise, the influence exercised for good or evil by the various states and their representatives — all these are brought before the eyes of the reader in dramatic procession. Chapters 6 to 14 discuss critically in turn the conventions, declarations and vœux produced by the Second Peace Conference, and bring to light the progress which through their adoption has been made by the body of international law. On the other hand, the clearing up of doubtful points in the conventions and the settling of such controversies as arise from the inadequate wording of many rules are outside the range of the work, although occasionally — see for instance, volume one, page 536, concerning paragraph *h* of article 23 of the Hague regulations respecting warfare on land — the attention is drawn to some such matter.

In addition to the discussion of the conventions the work contains valuable excursions into matter of great interest, since they enable the

reader to realize the true meaning of the results produced by the conferences. Thus on pages 1–6 an analogy is drawn between the growth of common law and that of the law of nations, which shows the mind and hand of a master of our science. On pages 7–25 is an excellent sketch of the different conferences, which have taken place since the Treaty of Westphalia up to the time of the Conference of 1899. Pages 25–34 show how, since the days of Henry IV of France and his minister Sully, public opinion was prepared by statesmen and clergymen, philosphers and jurists, for the coming of such a conference as that of the Hague in 1899. A good history of the rise and practice of arbitration since the time of the Greeks and Romans to our own is to be found on pages 188–253, and the factors which necessarily make for peace in our epoch are marshalled on pages 672–697.

However, the mere enumeration of all the matters treated in this work does not bring out its true merits. To do real justice to the book it must be mentioned that the author, who was technical delegate of the United States to the Second Peace Conference, and who therefore speaks to a great extent from personal knowledge, refuses to play the part of a simple spectator and recorder, but exercises also the tasks of an acute critic and a wise counsellor. It is for this reason that the qualities of his strong personality, combined with a warm heart, make themselves felt on almost every page, of a personality filled with ideals for the progress of the world at large.

The author's desire for justice and peace among the nations of the earth, his tact in dealing with such powers and their representatives as tampered with or even wrecked the proposals of the progressive party at the conferences, his convincing common sense and clear legal convictions everywhere come into play and furnish his work with a personal touch of great fascination. Some statements of the author make a particularly deep and lasting impression. Thus the subject of compulsory arbitration left with the pronouncement (p. 385):

It is, therefore, improbable that any nation or collection of nations will hereafter hold a brief against compulsory arbitration.

Again the following dictum closes a discussion of aerial warfare:

The slaughter of our kind proceeds by land and sea, and the Conference opened up a new element, the air, so that the bowels of the earth — unless infected by mines — are the only refuge of peace.

And, lastly, I may be permitted to quote some lines (p. 671) of the author on disarmament:

Although enthusiasts propose disarmament or the limitation of armaments in the present state of the world's affairs, public opinion does not seem ripe for either proposal. Without venturing a criticism of those with whose aims I deeply sympathize, I believe that more real progress would be made towards disarmament or the limitation of armaments if a sane and serious attempt were made to eliminate the causes that ordinarily produce war, or if a satisfactory substitute for war were matured so reasonable in itself that it would be unreasonable not to accept it as a substitute. * * * We recognize peace, not war, as the normal state of mankind; therefore all means calculated to maintain peace and which actually do maintain it are steps toward disarmament or the limitation of armaments. From this point of view, disarmament is not looked upon as a condition precedent to peace; but as the consequence of the pacific settlement of international disputes.

L. OPPENHEIM.

Le Condominium Franco-Anglais des Nouvelles-Hébrides. By N. Politis, Professor of Law in the University of Poitiers, Associate of the Institute of International Law. Paris: A. Pedone. 1908. pp. iv, 151.

The New Hebrides are as an open book to the accomplished Professor of International Law in the University of Poitiers who has taken a keen, one might say an abnormal interest during the last few years in the welfare and destiny of the islands, and his various articles, *The International Condition of the New Hebrides* [Revue générale de droit international public, vol. VIII (1901) pp. 121, 230 *et seq.*], *The condition of the New Hebrides under the Franco-British Agreement of 1904* [*ibid,* vol. XI, (1904) pp. 755 *et seq.*], are authoritative. The recent treaty of October 20, 1906, between France and Great Britain establishing a government and adequate governmental machinery in the islands (for the text of which see this JOURNAL, SUPPLEMENT, *1*:179) has caused Professor Politis to return to the subject anew, and to publish the brochure mentioned in the caption.

The author does not regard the situation created by the treaty as permanent and rightly points out that the contracting parties are fully aware of its temporary nature. His purpose is to explain the treaty rather than to defend it, although in the final chapter he answers in a conclusive manner the various attacks made upon it by extremists upon both sides of the channel. He admits that it might have been better to have ceded the islands to one government or the other but points out the difficulties in the way of such a settlement, for although the preponderating influence of France in the soil is marked, and French colonists are numerically more numerous, the preponderance is not so great as to

make a cession to France appeal to an English public especially in view of the Australian jealousy of France. He also shows that a geographical and physical division of the islands between France and Great Britain might result less favorably to France and French influence, whereas the condominium of France and Great Britain as established and defined in the treaty is just to the interests of both and leaves the ultimate destiny of the islands to future developments. Notwithstanding his keen interest in the subject and his desire to see France acquire undisputed possession and control of the islands, his treatment of the opposing views of France and Great Britain is scrupulously fair and impartial.

We are not, however, interested in the treaty as such, but in Professor Politis' exposition of its provisions, which is admirable. He might have explained the treaty article by article and have commented upon each in turn. Instead of this he has chosen the more difficult and more scientific method of analysis. Without quoting the text he has made its provisions clear and shown the necessary and logical connection between them as well as the consistency of the whole. The historical introduction is compressed within the narrowest limits, for his purpose is not so much to trace the historical development of the movement, which he had already done in previous publications, but to expound, and at times to justify the situation created by the treaty of October 20, 1906. As an example of consummate skill in handling a difficult and complicated question, the reviewer calls attention to the masterly analysis of the opposing views of France and Great Britain in the matter of quieting title to the lands held or claimed by French citizens and British subjects in the islands — the crux of the question, for on the ownership of the land depends in great measure the future of the New Hebrides — the fairness with which each view is stated, the subtle criticism of the British contentions and the justification of the compromise solution which Professor Politis rightly regards as a French triumph (pp. 62–78). It is no exaggeration to state that the passages referred to are masterly and a model of sound and judicious exposition.

Leaving aside the purpose, the method of execution, and the execution itself, the brochure consists of a brief introduction (pp. 5–7) and six chapters, the origin of the condominium (pp. 9–18); the fundamentals of the condominium (pp. 19–31); administrative organization (pp. 32–48); judicial organization (pp. 49–61); legislative organization (pp. 62–95); the future of the condominium (pp. 96–102). In an appendix (pp. 105–147) are printed the treaty of October 20, 1906, and the

various regulations and instructions of the two governments, necessary to its understanding.

The brochure is admirably clear, well written, judicial as well as judicious, and suffices to give the general reader as well as the professional student the necessary information on the present international status of the New Hebrides.

JAMES BROWN SCOTT.

Internationalism. By Wilbur F. Crafts. Washington, D. C. The International Reform Bureau. 96 pp., 40 cts.

This is a second revised edition (the first was a private presentation edition), issued with special reference to the Balkan crisis in the "Concert of Europe," and the first Concert of the World, the Opium Conference of American, Asiatic and European powers called by President Roosevelt to meet at Shanghai on January 1st. Chapter one recalls the crusades and other instances where three or more nations have cooperated in war. Chapter two records the great treaties made by three or more great powers at the end of wars to keep the peace of the world and "the balance of power." Chapter three covers international arbitration and the Hague Court. Chapter four shows international cooperation in commerce; five, in philanthropy, such as the Geneva Red Cross Convention. Then much more at length chapter six records the progress against alcohol and opium as hindrances to progress in other lands. There are other chapters on the international white slave traffic, international action needed on gambling and immigration. The book is prepared especially to furnish subjects for debate, which are noted in its margins. Pages 18 to 21 give a convenient list of conferences of three or more powers during the nineteenth century.

In a volume of lxiv, 542 pages entitled *Arbitraje Internacional entre el Perú y el Brasil,* and published in Buenos Aires, appear the documents and claims of Peru in the arbitration with Brazil concerning the claims of citizens injured in the regions of Alto Yuruá and Alto Purús. By the treaty of July 12, 1904, between Peru and Brazil these regions were neutralized pending the settlement of the boundary discussions. On the same day an agreement was signed for the arbitration of the claims of citizens of both countries for injuries received in these territories since the year 1902, and the present volume is the presentation of the claims

of Peru by its agent, Anibal Maurtua. The regions neutralized are in the neighborhood of the well-known Acre territory, and a map accompanying the book shows the various boundary lines which Brazil, Peru, and Bolivia seek to maintain, and gives a very vivid impression of the intricate nature of the overlapping claims of these countries. The volume is composed mostly of documents brought forward to support the claims listed in the argument which fills the first portion of the book.

In an *Annual Report for 1907 on Reforms and Progress in Korea*, (139 pp.), prepared at the Japanese Residency-General, is given a review of the administrative, judicial, financial, commercial, agricultural, industrial, sanitary and educational work of the Japanese government in Korea. An introduction deals with the relations of Korea and Japan before and since the New Agreement of 1907, and the author expresses the hope that "the progress of Korea, unhampered by political jealousies and international rivalries, which have been productive of so much harm in the past, will continue uninterruptedly, under the guidance of the Resident General, aided by the united efforts of the Korean Government and its patriotic subjects." Tables of statistics are given, followed by maps showing the harbor and road improvements. Under the New Agreement Korea acts "under the guidance of the Resident General in respect to reforms in administration," and does not "enact any laws, ordinances or regulations," or "take any important measures of administration, without the previous assent of the Resident General." Judicial affairs are set apart from ordinary administration and the "appointment and dismissal of all high officials in Korea shall be made upon the concurrence of the Resident General;" while the local Korean government is still further bound by the provision that it "shall appoint as Korean officials Japanese subjects recommended by the Resident General."

The JOURNAL has received the *Anuario estadístico de la República Oriental del Uruguay*, a general statistical statement of the condition of that country, published by the General Bureau of Statistics of Uruguay. (1909).

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